No. 108

Brf. of Knight for Ld. & Co.

Office Supreme Court, U. S.
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No. 354

Filed Oct. 5, 1898.

IN THE Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

THE FARMERS' LOAN AND TRUST COMPANY,
Plaintiff in Error,
vs.
THE LAKE STREET ELEVATED RAILROAD COMPANY, THE AMERICAN TRUST AND SAVINGS BANK, AND THE NORTHERN TRUST COMPANY,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT ON MOTION TO DISMISS AND TO AFFIRM.

CLARENCE A. KNIGHT,
Attorney for The Lake Street Elevated Railroad Company.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Circuit Court of the United States,

FOR THE NORTHERN DISTRICT OF ILLINOIS,

The Farmers' Loan and Trust Co., Trustee, *Complainant,* *vs.* Lake Street Elevated Railroad Co. *et al.*, *Defendants.*	*Bill for Foreclosure.*

A writ of error and a supersedeas has been this day granted from the Supreme Court of the United States to the Supreme Court of Illinois in the case begun in the Superior Court of Cook County, Illinois, by The Lake Street Elevated Railroad Company against the Farmers' Loan and Trust Company *et al.*, for the removal of said Farmers' Loan and Trust Company as trustee under the mortgage, to foreclose which this suit was brought. In consideration thereof it is hereby stipulated that no steps or proceedings shall be had or taken in said suit so commenced in said Superior Court or in this foreclosure cause until said Supreme Court of the United States shall decide a motion to vacate said supersedeas and writ of error, which motion shall be made by said Lake Street Elevated Railroad Company on the second Monday in October, A.D. 1898.

Dated July 7, 1898.

RUNNELLS & BURRY,
For Complainant.
CLARENCE KNIGHT,
For Lake Street El R.R. Co.

IN THE

Supreme Court of the United States.

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THE FARMERS' LOAN AND TRUST COMPANY,
Plaintiff in Error,
vs.
THE LAKE STREET ELEVATED RAILROAD COMPANY, THE AMERICAN TRUST AND SAVINGS BANK, AND THE NORTHERN TRUST COMPANY,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

STATEMENT.

MAY IT PLEASE THE COURT:

The defendant in error, The Lake Street Elevated Railroad Company, has submitted to this Honorable Court a motion to dismiss the writ of error and quash the supersedeas upon the ground that the court is without jurisdiction of this cause, and also has joined in said motion a motion to affirm in case the court should hold that it has jurisdiction.

The writ of error and supersedeas were granted by Mr. Justice Brown July 7, 1898. Objections were made to the issuing of the writ of error by counsel for the Lake Street Company, but it was granted with a

stipulation that a motion should be made to dismiss the writ of error and to quash the supersedeas at the convening of the court. At the same time a stipulation was made that no further steps or proceedings should be had in the foreclosure case pending in the United States Circuit Court for the Northern District of Illinois until the court should decide the motion.

The Lake Street Elevated Railroad Company is a corporation organized under the general railroad law of the State of Illinois. It has built and put in operation a railroad running through the business district of the City of Chicago westwardly for a distance of about seven miles. This railroad is commonly spoken of as an elevated railroad and used for the purpose of intramural transportation, furnishing quick, rapid and cheap transportation in the City of Chicago and for the accommodation of people residing in the suburbs adjoining the west part of the City of Chicago. In pursuance of its corporate powers and for corporate purposes, on April 7, 1893, it made a trust deed or mortgage (see Rec., 16) upon all its corporate property and franchises, to secure an issue of bonds to the amount of $6,500,000, being 6,500 for $1,000 each, and to secure such additional bonds as might be issued from time to time, as provided in the trust deed. The trust deed was in the usual and ordinary form of mortgages or trust deeds given by railroad companies and contained the usual and ordinary covenants and vested the title of its corporate property under this trust deed in the American Trust and Savings Bank, a corporation under the laws of the State of Illinois, as trustee, and the Farmers' Loan and Trust Company, a corporation under the laws of the State of New York, as co-trustee. Under this trust deed no act was valid unless

concurred in by both trustees. Both trustees were required to certify to the bonds, pass upon the questions of insurance, as to issuing of additional bonds, as to releasing property no longer needed for railroad purposes, and provided that 1,000 of the bonds for the principal sum of $1,000,000 should be held by the trustees in exchange for 812 bonds issued under a prior mortgage, and that the trustees might in case of default take possession of and operate the railroad, and might permit necessary changes to be made in the line of the railroad as might in their judgment be advisable and advantageous, and that in case of the sale of the property and the payment of the proceeds to the trustees that they should ask for proposals for the sale of bonds secured by mortgage, and in case that no proposals were received, that the trustees might purchase the bonds upon the New York stock exchange or Chicago stock exchange, and that all bonds so purchased should be surrendered up and canceled, and that the trustees or either of them might resign and be discharged of the trusts, and further that in case at any time either of the trustees should die or resign or be removed or otherwise cease to act or become incapable of acting, a successor should be appointed by the surviving trustee, or if there be no surviving trustee then by the railroad company, or in case no such appointment should be made within thirty days, then by any judge of the United States Circuit Court for the Seventh Circuit upon the application of not less than $1,000,000 of principal of the bonds, and that in case the holders of a majority in interest of the bonds be dissatisfied with any trustee or trustees so appointed, that a new trustee might be nominated by the holders of a majority in interest of the bonds and should be appointed

by a judge of the Circuit Court upon application by the holders of such majority and eight days' written notice thereof given to the railroad company. Also that every holder of the bonds secured thereby accepted the same subject to the express understanding and agreement that every right of action whether at law or in equity under the trust deed was vested exclusively in the trustees, and that under no circumstances should a holder of any bonds or coupons, or any part of such holders, have any right to institute any action at law upon any coupon or coupons, or otherwise, or any suit or proceeding in equity or otherwise, for the purpose of enforcing payment, etc., or to foreclose the mortgage, except in case of refusal of the trustees to perform the duty imposed upon them. It is further provided in said trust deed as follows:

"It is understood and agreed that the word 'trustee' or 'trustees' as used in this instrument shall be held and construed to mean the parties of the second and third parts, or their successor or successors for the time being in the trust hereby created"; the party of the second part being the American Trust and Savings Bank and the party of the third part being the Farmers' Loan and Trust Company; and it also provided for meetings of the holders of bonds secured by the instrument.

Under this trust deed bonds were issued and certified by the two trustees to the amount of $6,500,000, and afterwards additional bonds were issued so that the amount of bonds outstanding in January, 1895, was $7,474,000. The company was unable to pay the interest upon its bonded indebtedness, and in January, 1895, at the annual meeting of the stockholders, a committee was appointed to confer with a committee to be appointed by the holders of the bonds of the company. These com-

mittees were appointed and finally settled upon a method of adjusting the bonded indebtedness. This proposed adjustment or reorganization (Rec., 329) was concurred in by the holders of bonds to the amount of $6,594,000, leaving non-consenting bonds to the amount of $881,000. Of these 881 bonds, 610 were owned or controlled by William Ziegler of New York, a former director and a stockholder of the company.

On December 30, 1895, the Lake Street Company filed a bill in chancery in the Circuit Court of Cook County, Illinois, asking that 605 of the 610 bonds be surrendered and canceled upon payment to Mr. Ziegler of the amount, if anything, that should be found due him upon an accounting between the company and himself as a director of the company; thus leaving only 276 of the bonds which had not consented to the adjustment arrangement or the validity of which was not attacked or held by the company. The $6,594,000 of bonds were deposited with the Northern Trust Company, Chicago, Illinois, and under the reorganization arrangement the title to these bonds was vested in the Northern Trust Company. (Rec., 331.)

On the morning of January 30, 1896. the defendant in error, The Lake Street Elevated Railroad Company, filed a bill in chancery in the Superior Court of Cook County, Illinois (Rec., 2–57), and made defendants thereto the Farmers' Loan and Trust Company, the American rust and Savings Bank and the Northern Trust Company. In this bill it set forth its incorporation in August, 1892, as a railroad company under the general railroad laws of the State of Illinois, with a capital stock of $5,000,000, and that in April, 1893, its capital stock was duly increased to $10,000,000, con-

sisting of 100,000 shares of $100 each; the execution and delivery of the trust deed or mortgage heretofore referred to, and that at the time the mortgage was made the Farmers' Loan and Trust Company was a corporation under the laws of the State of New York, and had not complied with the laws of the State of Illinois, requiring the deposit with the auditor of public accounts, for the benefit of the creditors of said company, of the sum of $200,000 in stocks of the United States or municipal bonds of the state, or in mortgages on improved or productive real estate of the state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon; that at the time of the execution and delivery and acceptance of the trusts in the mortgage the complainant did not know that the Farmers' Loan and Trust Company had not complied with the laws of the State of Illinois as to such deposit; that since the acceptance of the trust the Farmers' Loan and Trust Company had been doing business in the State of Illinois without having made the deposit as required by the laws of the State of Illinois; that the Farmers' Loan and Trust Company appointed an agent to represent it for the purpose of enforcing compliance upon the part of complainants of the trusts reposed in it; and that the $6,500,000 of bonds were certified and delivered by the trustees, and afterwards additional bonds were issued; that since the making and execution of the mortgage that the complainant had built and was then operating a railroad; that the railroad was used exclusively for the transportation of passengers; that it was unable to pay the interest upon its bonds; that William Ziegler, representing 610 of the bonds, had made a demand upon the trust companies to foreclose the mortgage and take possession of

the railroad under the powers contained in the mortgage, or to file a bill to foreclose said mortgage; that the complainant had filed a bill in the Circuit Court of Cook County, Illinois, against Ziegler and the two trust companies, under which injunction issued enjoining them from taking any action or proceeding to foreclose the mortgage under the request or demand by Ziegler and others representing 605 of the 610 bonds; that the complainant was informed by the agent of the Farmers' Loan and Trust Company that no other demand for action had been made upon the Farmers' Loan and Trust Company than that made by Ziegler, but that notwithstanding that no other person was asking or demanding of the Farmers' Company any action or proceeding on behalf of other bondholders than as to said 610 bonds that the Farmers' Company proposed to and would file a bill to foreclose the mortgage for failure to pay the interest upon the bonded indebtedness; that the interest upon all the bonded indebtedness was paid up to January 1, 1895, and that notwithstanding that no demand had been made for the payment of coupons upon the bonds falling due July 1, 1895, and January 1, 1896, no demand or request was made upon the Farmers' Loan and Trust Company to take any action or proceeding other than on said 610 bonds, yet the Farmers' Company, in violation of its duty and for the purpose of injuring and destroying the property and assets of complainant, intended to, unless restrained, "proceed to take possession of or attempt to foreclose said mortgage or trust deed"; that the holders of 6,574 of the bonds had especially requested the trustees to take no action with reference to the interest upon the coupons falling due July 1, 1895, and January 1, 1896; that the American

Trust and Savings Bank, after full examination of the affairs of the company, did, on January 28, 1896, decline and refuse to join with the Farmers' Company in any proceeding whatsoever to foreclose the mortgage; that it was the desire and wish of the holders of over 6,500 of the bonds that the Farmers' Loan and Trust Company should be removed from its position as trustee under said mortgage, first, for failure to comply with the laws of the State of Illinois, and second, for assuming to act or take proceedings under the mortgage contrary to and in violation of the request of the holders of the bonds issued under the mortgage or deed of trust, and made the Farmers' Loan and Trust Company, the American Trust and Savings Bank and the Northern Trust Company, the holder of over 6,500 bonds issued under said mortgage, parties defendant, and prayed, first, that a new trustee might be appointed by the court to act under and by virtue of said mortgage or deed of trust in place of the Farmers' Loan and Trust Company; second, that injunction *pendente lite* be issued to restrain the Farmers' Loan and Trust Company from taking any proceedings or bringing or prosecuting any suit or suits or acting in any manner whatsoever under or by virtue of the provisions and conditions of said mortgage or deed of trust, and upon final hearing the injunction be made perpetual; and third, prayer for general relief.

Under this bill an injunction was granted and served upon the agent of the Farmers' Company at 11:10 A. M., January 30, 1896, and summons was served on said agent on February 6, 1896.

On January 31, 1896, the Farmers' Company filed a petition for the removal of the cause to the United States Court. Accompanying the petition or filed with it was a

document purporting to be a bond. The petition was signed by the Farmers' Loan and Trust Company by its solicitors; the purported bond had no *principal* and was executed only by William Burry and Rockwell King. The petition (Rec., 60–65) avers that the matter in dispute, exclusive of interest and costs, amounted to the sum of $2,000; that the Farmers' Loan and Trust Company was a corporation under the laws of the State of New York; that The Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company were all corporations organized and citizens of the State of Illinois; "that in this cause there are controversies which are wholly between citizens of different states, which controversies can be fully determined as between them, and the said controversies are between petitioner on the one part and The Lake Street Elevated Railroad Company on the other part, and are as follows: First, a controversy concerning the right of petitioner to act as trustee under the mortgage, a copy of which is attached to the bill of complaint; second, a controversy concerning the removal of petitioner as trustee under said mortgage; third, a controversy concerning the enjoining of petitioner from taking any proceedings or bringing or prosecuting any suit or suits or acting under and by virtue of the terms, conditions and provisions of said mortgage."

The petition further stated that "if the controversy in this cause is one and inseparable, then that such controversy is wholly between citizens of different states and it can be fully determined between them, and that said controversy is between petitioner on the one part and the said The Lake Street Elevated Railroad Company on the other part, and that said other defendants, the American

Trust and Savings Bank and the Northern Trust Company, are not proper or necessary parties in this cause." It then recites that on January 30, 1896, it exhibited in the Circuit Court of the United States for the Northern District of Illinois its bill in chancery for foreclosure of the mortgage; that its bill of complaint was filed prior to the commencement of this suit and that the suit so commenced was still pending and undetermined; that the bringing of this suit and the issuing of the injunction tends to obstruct and impede the administration and jurisdiction of the Circuit Court of the United States, and interferes with a property thereby brought into the said Circuit Court, and that there is therefore involved in the suit a controversy arising under and by virtue of the laws of the United States, "which controversy affects the jurisdiction of the said Circuit Court of the United States in said cause so commenced by petitioner." That "petitioner offers herewith a good and sufficient bond in the penal sum of $500, conditioned," etc.

The document purporting to be a bond was dated January 31, 1896, and was as follows:

"Know all men by these presents, that we, William Burry and Rockwell King, of Chicago, in the County of Cook and State of Illinois, are held and firmly bound unto The Lake Street Elevated Railroad Company in the penal sum of five hundred dollars ($500), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors or administrators, jointly and severally and firmly by these presents.

Witness our hands and seals this 31st day of January, A. D. 1896.

The condition of the above obligation is such that if the Farmers' Loan and Trust Company shall enter and file or cause to be entered and filed, in the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division, on the first day of its next session, a copy of the record and proceedings in a certain suit or action now pending in the Superior Court of Cook County, in the State of Illinois, bearing general number 172,156, in which said Lake Street Elevated Railroad Company is complainant and said Farmers' Loan and Trust Company and others are defendants, and shall pay all costs that may be awarded by the said Circuit Court of the United States, if said Circuit Court shall hold that said suit was wrongfully or improperly removed to said United States Circuit Court, then this obligation to be void, otherwise to remain in full force and effect.

WILLIAM BURRY. [SEAL]
ROCKWELL KING. [SEAL]"

On Saturday, the 1st day of February, the last day of the January term of the Superior Court, a motion was made in writing in said cause as follows:

"Now comes the Farmers' Loan and Trust Company, by Runnells & Burry, its solicitors, and for the purpose of this motion only, moves the court to grant the petition filed January 31, 1896, for the removal of this cause to the United States Circuit Court therein mentioned, and approve the bond for removal filed with said petition."

On Monday, the 3rd day of February, the cause came on for hearing on the motion for removal to the United States Court. The order of court entered (Rec., 73), denying the motion to remove, was as follows:

"This day came on for hearing the motion on the petition and bond for removal of this cause to the United States Circuit Court, and after consideration it is ordered that the same be denied."

To which ruling the Farmers' Loan and Trust Company then and there excepted, and the court gave ten days in which to present a certificate of evidence in connection with said ruling.

The appearance of the Northern Trust Company was filed in the cause January 31, 1896, and appearance of the American Trust and Savings Bank was filed February 1, 1896. On the 17th of March the Northern Trust Company filed its answer. On the 18th of March the Farmers' Loan and Trust Company entered its appearance and asked leave to answer (Rec., 80). On the 18th of March the American Trust and Savings Bank filed its answer. On the 25th of March, 1896 the Farmers' Loan and Trust Company filed its answer. On April 1, 1896, the injunction was dissolved. On April 22, 1896, the Farmers' Loan and Trust Company was given leave to file an amended answer, which was filed April 28, 1896. Replications were duly filed to the respective answers, and on May 5, 1896, the cause came on for hearing before Honorable John Barton Payne, judge of the Superior Court. After a very full hearing, as the record will show, a final decree was entered on June 4, 1896 (Rec., 156), finding the allegations of the bill were true, and removing the Farmers' Loan and Trust Company as trustee under the mortgage referred to and enjoining it from taking any proceedings or bringing or prosecuting any suit or suits to foreclose the mortgage or trust deed referred to, and directing the American Trust and Savings Bank to appoint by an instrument in writing

within thirty days from the date of the entry of the decree a co-trustee, and in case of the failure of the American Trust and Savings Bank to make the appointment within thirty days, then that the court reserved the right, power and authority to appoint a co-trustee as successor to the Farmers' Loan and Trust Company under said trust deed The decree recites that after the opinion of the court was delivered that the Farmers' Loan and Trust Company asked time to consider whether to make the deposit of $200,000 under the laws of the State of Illinois. This was on May 29, 1896, and the court gave to the Farmers' Loan and Trust Company until the 3d day of June to determine whether it would make such deposit. On the 4th day of June the Farmers' Loan and Trust Company in open court through its solicitors stated that it refused and declined to make the deposit as required by the laws of the State of Illinois, and it was thereupon ordered by the court that it be removed as trustee.

The Farmers' Loan and Trust Company was removed from this trusteeship for failure to make the deposit as required by the laws of the State of Illinois.

From this decree of the Superior Court of Cook County an appeal was duly taken to the Appellate Court for the First District of Illinois. After a hearing in that court the decree of the court below was affirmed by an opinion filed the 9th day of February, 1897. See

Farmers' Loan & Trust Co. v. *Lake Street Ele. R. R. Co.*, 68 Ill. App., 666.

From the affirmance of the Appellate Court the Farmers' Loan and Trust Company perfected an appeal to the Supreme Court of the State of Illinois. An opinion

was handed down by the Supreme Court of Illinois, June 18, 1898, affirming the judgment of the Appellate Court and the decree of the Superior Court.

The F. L. & T. Co. v. *The Lake Street Elevated Railroad Company*, 173 Ill., 439. (Advance sheets.)

From the judgment of affirmance of the Supreme Court of Illinois this writ of error has been prosecuted to this Honorable Court.

A bill to foreclose the mortgage or trust deed was filed in the Circuit Court of the United States for the Northern District of Illinois on the morning of January 30, 1896, at 10:35. The subpœna issued upon the filing of said bill was held by the solicitor for the complainant until the 18th day of February, 1896, and was then for the first time given to the marshal for service and was served by the marshal on the 18th day of February. Summons in this case, however, was served on the 6th day of February and the injunction writ on the 30th day of January, 1896. (See findings of decree, Rec., 190.)

The only Federal question possibly involved in the case is whether the state court erred in refusing to grant the removal of this cause to the United States Circuit Court. That involves two questions: First, as to whether or not there is a separable controversy in this cause between The Lake Street Elevated Railroad Company and the Farmers' Loan and Trust Company which could be wholly determined between them without the presence of the other two defendants or either of them. Second, as to whether or not the purported bond presented with the petition for removal was a compliance with the act of Congress.

The petition for removal alleged that the controversy was wholly between the Farmers' Company and the Lake Street Company, and was as follows:

1st. Concerning the right of the petitioner to act as trustee under the mortgage.

2d. Concerning the removal of petitioner as trustee under said mortgage.

3rd. Concerning the enjoining of petitioner from taking or prosecuting any proceedings or suits under said mortgage.

If the court determines that there is no separable controversy and that the American Trust and Savings Bank and the Northern Trust Company, or either of them, are necessary and indispensable parties to the litigation, then the question as to the sufficiency of the bond does not need to be determined. It is sought, however, to inject into this case a Federal question upon the ground that a bill to foreclose the mortgage had been filed in the United States court prior to the time this bill was filed in the Superior Court, but that question is easily disposed of for the reason that no service was had of the process issued in that cause nor any notice given thereof of any kind or character whatsoever to the Lake Street Company prior to the service of the injunction writ on January 30, 1896, at 11:10 o'clock, or prior to the service of the summons on February 6, 1896. The subpœna in the foreclosure case was not served until February 18, 1896, and was then served in violation of the injunction issued in this cause and which had not up to that time been dissolved, but was served the morning the motion to remand this cause to the state court came up for hearing in the United States court.

On February 4, 1896, a transcript of the proceedings in the state court was by leave of court filed in the United States Circuit Court. (Rec., 654.) A motion was made to remand the cause on February 5 by the Northern Trust Company, and February 17 by the American Trust and Savings Bank, and on February 18 by the Lake Street Company. The motion to remand came on for hearing before Judge Grosscup on February 18 (Rec., 677), and the same day, while the injunction was still in force, the Farmers' Company caused the subpœna in the foreclosure case to be served on the Lake Street Company. On March 16th, order of Judge Grosscup denying the motion to remand and modifying injunction. (Rec., 682.) Afterwards the injunction was dissolved by Judge Grosscup and also by the state court, as heretofore stated. From the order of Judge Grosscup dissolving the injunction an appeal was taken to the Court of Appeals, but that court declined to pass upon the question as to whether the state court erred in refusing to permit the case to be removed or whether Judge Grosscup erred in refusing to remand the cause, holding that if the action of the United States court was improper then its order dissolving the injunction was a nullity.

The decision of the Court of Appeals will be found in the case of

Lake St. Ele. R. R. Co. v. *Farmers' L. & T. Co.*, 77 Fed. Rep., 769.

The opinion of Judge Grosscup proceeds upon the mistaken theory that the bill was simply and purely an injunction bill and that "the principal controversy was not whether the trustee was incapable under the laws of Illinois of holding its place, but whether such trustee has

the power and right under the provisions of the trust deed as applied to the situation disclosed to set foreclosure proceedings in motion."

And said: "If the sole purpose of this bill were to remove the Farmers' Loan and Trust Company as trustee under the trust deed there could be no doubt of the indispensableness of either the bondholder or their remaining trustee as parties to the suit."

But since the decision of Judge Grosscup it is proper to say that three different courts have held that the purpose of the bill was to remove the Farmers' Loan and Trust Company as trustee because it was incapable of acting under the laws of the State of Illinois.

BRIEF.

I.

Under the trust deed, the American Trust and Savings Bank and the Farmers' Loan and Trust Company were made a collective trustee, so to speak. Neither could act without the concurrence of the other; no suit could be begun by or against without joining both trustees; injunction could not issue to prevent one trustee from acting without joining both.

McGeorge v. *Big Stone Gap Imp. Co.*, 88 Fed. Rep., 599.
Lewin on Trusts, Sec. 298.
Beach's Modern Eq. Prac., Sec. 57.
Perry on Trusts, Sec. 411.
Perry on Trusts, Sec. 493, 4th Ed.
McArthur v. *Scott*, 113 U. S., 340.
Winchester v. *Loud*, 108 U. S., 130.

Gregory v. *Stetson*, 133 U. S., 579.
Wall v. *Thomas*, 41 Fed. Rep., 620.
Hutchinson v. *Ayers*, 117 Ill., 565.
Regan v. *West*, 115 Ill., 603.
Penn. Co. v. *Bauerle*, 143 Ill., 459.
Cameron v. *McRoberts*, 3 Wheaton, 591.
Shaw v. *R. R. Co.*, 5 Gray, 162.
Carey v. *Brown*, 92 U. S., 171.
Bear v. *Tel. Co.*, 36 Hun, 400.
Railroad Co. v. *Wilson*, 114 U. S., 60.

II.

Ordinarily *cestuis que trust* should be made parties, but there are two exceptions:

1st. When the absent parties are properly represented it is sufficient to make such representatives parties to the suit.

2d. Where the beneficiaries are very numerous and the trustees representing them are made parties.

Jones on Corporate Bonds & Mortgages, Sec. 398.
Railroad Co. v. *Orr*, 18 Wallace, 471.
Ribon v. *R. R. Co.*, 16 Wall., 446.
Payne v. *Hook*, 7 Wallace, 425.
Knapp v. *R. R. Co.*, 20 Wallace, 118.
Carey v. *Brown*, 92 U. S., 171.
Hotel Co. v. *Wade*, 97 U. S., 13.
Bowdoin College v. *Merritt*, 54 Fed. Rep., 62.
Railroad Co. v. *Kerr*, 153 Ill., 182.
F. L. & T. Co. v. *Ele. R. R. Co.*, 173 Ill., 457.

Hale v. *Hale*, 146 Ill., 247.
Land Company v. *Peck*, 112 Ill., 408.
Van Vechten v. *Terry*, 2 Johns Ch., 197.
Story's Equity Pleading, Sec. 150.
Shaw v. *R. R. Co.*, 5 Gray, 162.
Black v. *R. R. Co.*, 24 N. J. Eq., 492.

III.

The trustees under a railroad mortgage must be arranged on the same side, and even if bondholders commence suit to foreclose and make the trustees defendants, then the trustees must be arranged along with the bondholders.

R. R. Co. v. *Ketchum*, 101 U. S., 293.
Barry v. *Railroad Co.*, 27 Fed. Rep., 2,
Gardner v. *Brown*, 21 Wallace, 36.

IV.

There was no separable controversy between The Lake Street Elevated Railroad Company and the Farmers' Loan and Trust Company, so as to justify a removal.

"In order to justify such removal on the ground of separable controversy between citizens of different states there must be, by the very terms of the statute, a controversy which can be fully determined as between them, and by the settled construction of this section the whole subject matter of the suit must be capable of being finally determined as between them and complete relief afforded as to separate cause of action, *without the presence of others originally made parties to the suit.*"

Wilson v. *Oswego Township*, 151 U. S., 56.
Torrence v. *Shedd*, 144 U. S. 527.
Merchants' Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368.
Insurance Co. v. *Huntington*, 117 U. S., 280.
Bellaire v. *R. R. Co.*, 146 U. S., 117.
Hanrick v. *Hanrick*, 153 U. S., 192.
Fraser v. *Jennison*, 106 U. S., 191.
Winchester v. *Loud*, 108 U. S., 130.
Watson v. *R. R. Co.*, 73 Fed. Rep., 1.
Barth v. *Coler*, 60 Fed. Rep., 466, C. C. A.
Darst v. *Bates*, 51 Ill., 439.
Reno on Non-Residence, Sec. 129.
Springer v. *Sheels*, 115 No. Car., 380.
Sioux City T. R. R. Co. v. *Trust Co.*, 82 Fed. Rep., 124.
Shields v. *Barrows*, 17 Howard, 130.

V.

It is not material in determining as to whether the cause was removable or not, as to what attitude upon the record the American Trust and Savings Bank and the Northern Trust Company took. The controversy was as to the right of the Lake Street Company to have a trustee appointed in place of the Farmers' Loan and Trust Company.

"Separate answers by the several defendants sued on in joint causes of action may present different questions for determination, but they do not necessarily divide the

suit into separate controversies. A defendant has no right to say that an action shall be several which the plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive the plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject matter in the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

The remedy which the complainant sought required the presence of all the defendants, and the settlement not of one branch only but of all branches of the case so as to afford the complainant not partial relief but a complete decree

Louisville, etc., Ry. Co. v. *Ide*, 114 U. S., 52.
Torrence v. *Shedd*, 144 U. S., 527.
Putnam v. *Ingraham*, 114 U. S., 57.
Brooks v. *Clark*, 119 U. S., 502.
Pirie v. *Tvedt*, 115 U. S., 41.
Sloan v. *Anderson*, 117 U. S., 275.
Little v. *Giles*, 118 U. S., 596.
L. & N. R. R. Co. v. *Wangelin*, 132 U. S., 599.
Ins. Co. v. *Huntington*, 117 U. S., 280.
Graves v. *Corbin*, 132 U. S., 571.
Construction Co. v. *Cane Creek*, 155 U. S., 283.
Wilson v. *Oswego Township*, 151 U. S., 56.
Thayer v. *Life Ins. Co.*, 112 U. S., 717.
Crump v. *Thurber*, 115 U. S., 56.

Rogers v. *VanNortwick*, 45 Fed. Rep., 513.

Thurber v. *Miller*, 67 Fed. Rep., 373.

Hicklin v. *Marco*, 56 Fed. Rep., 549.

In the following cases one of the defendants was a mere stakeholder but of the same state as the plaintiff, but were held to be indispensable parties to the final decree and therefore the cause was not removable.

Crump v. *Thurber*, 115 U. S., 56.

Wilson v. *Oswego Township*, 151 U. S., 56.

Thayer v. *Life Ins. Co.*, 112 U. S., 717.

Merchants Cotton Press Co. v. *N. A. Ins. Co*, 151 U. S., 383.

Rogers v. *VanNortwick*, 45 Fed. Rep., 513.

VI.

There was no federal question involved entitling the plaintiff in error to removal of the cause.

"No suit can be removed by a defendant from the state court into the Circuit Court of the United States as one arising under the constitution, laws or treaties of the United States, unless the fact that it so arises appears from the plaintiff's statements of his own claim, and a deficiency in his statement in this respect cannot be supplied by allegations in the petition for removal or in subsequent pleadings in the case."

Postal Tel. Co. v. *Alabama*, 155 U. S., 486.

Chappell v. *Waterworth*, 155 U. S., 102.

Tenn. v. *Bank of Commerce*, 152 U. S., 454.

R. R. Co. v. *Mills*, 113 U. S., 249.

Metcalf v. *Watertown*, 128 U. S., 586.

Colorado Co. v. *Turck*, 150 U. S., 138

East Lake Land Co. v. *Brown*, 155 U. S., 488.

R. R. Co. v. *Davidson*, 157 U. S., 201.

Oregon Short Line v. *Skottowe*, 162 U. S., 495.

Borgmeyer v. *Idler*, 159 U. S., 412.

Gold Washing Co. v. *Keyes*, 96 U. S., 199.

Crehore v. *Railway Co.*, 131 U. S., 242.

Stevens v. *Nichols*, 130 U. S., 230.

Railway Co. v. *Fitzgerald*, 160 U. S., 556.

Insurance Co. v. *Pechner*, 95 U. S., 185.

Wabash Co. v. *Barbour*, 73 Fed. Rep., 515.

State of Florida v. *Charlotte Harbor Co.*, 74 Fed. Rep., 579.

State of Kansas v. *Railroad Co.*, 77 Fed. Rep., 339.

VII.

The paper submitted with the petition for removal purporting to give security was not in compliance with the act of Congress which required that the party desiring the removal "shall make and file therewith a bond with good and sufficient surety." The state court had the right to deny the removal for that reason.

See act of Congress of July 27, 1866, as amended by act of March 7, 1867, in 18 Wallace, at page 556.

See comparison of act of 1875 and 1887 in 120 U. S., page 792.

Wilson v. *Western Union Tel. Co.*, 34 Fed. Rep., 561.
Austin v. *Gagan*, 39 Fed. Rep., 626.
Webber v. *Bishop*, 13 Fed. Rep., 49.
Shedd v. *Fuller*, 36 Fed. Rep., 609.
Weed Sewing M. Co. v. *Smith*, 71 Ill., 204.
Railway Co. v. *Monaghan*, 140 Ill., 474.
Darst v. *Bates*, 51 Ill., 439.
Tedrick v. *Wells*, 152 Ill., 214.
Steger v. *Steger*, 165 Ill., 579.
Hayes v. *Todd*, 34 Fla., 283.
Dunn v. *R. R. Co.*, 35 Minn., 73.
Stone v. *Sargent*, 129 Mass., 503.
Burdick v. *Hale*, 7 Bissell, 96.
Hunter v. *Colquit*, 73 Ga., 44.

VIII.

The question as to the removability of the cause is to be determined upon the record as made in the state court.

Crehore v. *Ry. Co.*, 131 U. S., 242.
Insurance Co. v. *Pechner*, 95 U. S., 185.
Carson v. *Dunham*, 121 U. S., 421.
Hall v. *Chattanooga Agricultural Works*, 48 Fed. R., 601.

IX.

The state court had the right to decide the question of removal for itself, and it was only subject to review by appeal through the Supreme Court of the state to this Honorable Court; even though a motion is made to remand and denied the state court still has the right to proceed.

Railway Co. v. *Fitzgerald*, 160 U. S., 556.

Stone v. *So. Carolina*, 117 U. S., 430.

Removal Cases, 100 U. S., 457.

Railway Co. v. *Dunn*, 122 U. S., 513.

Crehore v. *Ry. Co.*, 131 U. S., 242.

Merchants Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368.

Lake St. Ele. R. R. Co. v. *Farmers L. & T. Co.*, 77 Fed. Rep., 769, C. C. A.

X.

The service of the injunction writ on January 30th, at 11:10 o'clock A. M., and of the summons on February 6th were prior to the service of the summons in the foreclosure case, viz., on February 18th, and, therefore, if this cause did interfere with the foreclosure case then the service of the process of the state court gave prior jurisdiction to that court.

Zimmerman v. *SoRelle*, 80 F. R. 417 (C. C. A.).

Moran v. *Sturges*, 154 U. S., 256.

Insurance Co. v. *University*, 6 Fed. Rep., 443.

Sharon v. *Terry*, 36 Fed. Rep., 356.
Owens v. *R. R. Co.*, 20 Fed. Rep., 10.
Gaylord v. *Ry. Co.*, 6 Bissel, 286.
Home Insurance Co. v. *Howell*, 24 N. J. Eq., 238.
Farmers' L. & T. Co. v. *Hughes*, 11 Hun, 130.
Gibson v. *A. L. & T. Co.*, 58 Hun, 443.
Merritt v. *Steel Barge Co.*, 79 F. R., 228.

XI.

The question as to whether or not the Farmers' Loan and Trust Company had a right to act under the trust deed as trustee without complying with the laws of the State of Illinois depends upon the construction of the statutes of that state. Such being the case, and the court having construed that statute, this court will not revise or review the action of the state court in that respect. When the highest court of the state construes the meaning and effect of a state statute then such construction is held to be binding upon this court and will not be reviewed. This is so well settled by this court as to need no citation of authorities.

XII.

If the denial of the right to remove was right as a matter of law then it is not material upon what grounds the court below based its decision.

Kansas City Railway v. *Daughtry*, 138 U. S., 298.

ARGUMENT

I.

Under the trust deed the American Trust and Savings Bank and the Farmers' Loan and Trust Company were made a collective trustee, so to speak. Neither could act without concurrence of the other, no suit could be begun by or against without joining both; injunction could not issue to prevent one trustee from acting without joining both.

Ordinarily *cestuis que trust* should be made parties, but there are two exceptions to this rule. There was no separable controversy in this cause.

It appears by this record that The Lake Street Elevated Railroad Company is a corporation organized under the general railroad laws of the State of Illinois, and on April 7, 1893, conveyed to the American Trust and Savings Bank, as trustee, and the Farmers' Loan and Trust Company, as co-trustee, all of its property and franchises, to secure the payment of a proposed issue of bonds as therein recited. Under this trust deed the two trustees formed, as it were, one collective trustee. No suit could be maintained by one trustee nor begun by one without the concurrence of the other trustee. Their interests were so linked together by virtue of this instrument that they stood before the world as one person, or rather as one corporation. The bonds issued under the instrument were certified by both trustees, and the instrument declares that wherever the word "trustee" is used it should be taken to mean and refers to both trustees. It therefore shows the clear

intention on the part of the settlor of the trust that there should be at all times under the instrument two trustees legally capable and qualified to act. One purpose in nominating two trustees was to prevent either trustee at the instigation of bondholders who were not familiar with the situation of elevated railroads in the City of Chicago from taking any action without the concurrence of both trustees.

Where the settlor of the trust has agreed that to enforce the provisions of the mortgage it should be the united judgment of both trustees, then its contract in this respect would not be thwarted by the malice or selfish purposes of one trustee. If the voice of one trustee were to govern, why the necessity of two?

The case of

McGeorge v. *Big Stone Gap Improvement Co.*, 88 Fed. Rep., 599,

decided July 27, 1898, fully sustains the contention that where more than one trustee is created by an instrument that it requires the concurrence of all before any action can be taken thereunder, that is, they must act jointly. The court in that case said:

"It is scarcely necessary to cite authority for the proposition that a power conferred upon three trustees cannot be exercised by one only. The doctrine is thus stated in 1 Perry on Trusts, Section 411: 'Where a settlor vests his property in several co-trustees, they all form as it were one collective trustee.' * * * All who accept the office are acting trustees. * * * So if trustees bring suits or defend suits in court they must act jointly."

In

Lewin on Trusts, page 258,

it is said:

"Where the administration of the trust is to vest in co-trustees, they all form, as it were, but one collective trustee, and therefore must exercise the duties of their office in their joint capacity."

In

McArthur v. *Scott*, 113 U. S., 340,

it was held that the trustees are in all cases necessary parties to suits affecting the estate.

In

Beach's Modern Equity Practice, Sec. 57,

it is said that where "it is sought to restrain the defendant from participating in acts which they and their co-trustees are about to perform, the latter has a right to be heard before they shall be wholly prevented by an injunction against the defendant from doing what they propose."

In

Wall v. *Thomas*, 41 Fed. Rep., 620,

it was sought by a beneficiary who had an interest in the trust fund, to restrain four out of nine trustees. It was held by the court that the five absent trustees were indispensable parties to the controversy, that the court could not proceed until they were brought in. A preliminary injunction was refused, as to restrain the four trustees was in effect to restrain the five, not parties to the suit, because it required the action of the whole nine trustees to make valid any act.

In

Winchester v. *Loud*, 108 U. S., 130,

suit was brought for an accounting and for removal of two trustees and the appointment of others in their

places, and it was held that all the trustees were necessary parties to the suit.

In

Carey v. *Brown*, 92 U. S., 171,

it was said: "The general rule is that in suits respecting trust property brought either by or against the trustees, the *cestuis que trust* as well as the trustees are necessary parties. Story's Eq. Pl., Sec. 207. To this rule there are several exceptions; one of them is that when suit is brought by the trustee to recover the trust property or to reduce it to possession and in no wise affects the relations with the *cestuis que trust*, it is unnecessary to make the latter parties."

In

Shaw v. *Railroad Co.*, 5 Gray, 162,

a suit was brought to foreclose a railroad mortgage by five trustees. During the progress of the suit one of the trustees died. The court held it had no power to proceed until the vacancy was filled, that the right of action was joint in all the trustees, and that part of the trustees could not bring suit.

In

Knapp v. *Railroad Co.*, 20 Wallace, 118,

it was held that trustees under a railroad mortgage are absolutely necessary parties to any proceeding concerning the property, that there could not be any change of the contract without making the trustees a party, and it was not in the power of the legislature of the State of Vermont, without the consent of the *cestuis que trust*, to substitute a new trustee in place of the persons named in the mortgage. To change them was to change the contract in an important particular, and this could not be done without consent of the parties for whose benefit the trust was created.

In

Ribon v. *Railroad Co*, 16 Wallace, 446, the court draws the distinction in reference to making the *cestuis que trust* parties, that, if they are too numerous to be brought before the court, then some representative of that interest must be made parties.

Where a foreclosure of a railroad mortgage is begun by the bondholders and the trustees are made defendants, then it is well settled that the trustees are to be arranged along with the bondholders. So in case of a foreclosure of a mortgage where there are two trustees, if one trustee has the power at all to foreclose and the other trustee is made defendant, then upon the test of the question of jurisdiction of the United States court, the co-trustee certainly must be arranged, under the doctrine of *Railway Co.* v. *Ketchum*, 101 U. S., 293, along with the trustee bringing the suit.

But the main controversy in this case is whether there is a separable controversy between The Lake Street Elevated Railroad and the Farmers' Loan and Trust Company, and whether the purported bond was in compliance with the act of Congress The petition for removal stated that neither the American Trust and Savings Bank nor the Northern Trust Company were necessary or proper parties to the controversy between the Farmers' Loan and Trust Company and The Lake Street Elevated Railroad Company. Evidently the counsel for petitioner was rightfully under the impression that if either the American Trust and Savings Bank or the Northern Trust Company were necessary parties to the litigation then there was no case presented for removal. Three different courts have now held that the American Trust and Savings Bank and the Northern Trust Company were not

only necessary but indispensable parties to the litigation. The question as to whether or not this cause could proceed to a final decree without the presence of either the American Trust and Savings Bank or the Northern Trust Company must be determined under the rules of law as established by the Supreme Court of the State of Illinois. The cause was pending in the State of Illinois upon a bill filed in a court of general jurisdiction, and the question presented was whether upon the face of that bill the American Trust and Savings Bank and the Northern Trust Company were necessary parties or indispensable parties to permit the case to proceed to a final decree so the complainant might obtain the relief sought. The relief asked was the appointment of a new trustee in the place of the Farmers' Loan and Trust Company. Incidental to the relief of having a new trustee appointed was the right to an injunction *pendente lite*. Unless this injunction could be obtained the Farmers' Loan and Trust Company, pending the proceedings of its removal as trustee, could file a bill for foreclosure and wreck the entire trust estate. In the meantime the case would be proceeding in the courts for its removal as trustee, and before that end was accomplished and the relief obtained, all benefit from the decree would have been lost by the fact that the Farmers' Company had proceeded to a foreclosure of the trust instrument. There are other allegations in the bill with reference to the conduct of the Farmers' Loan and Trust Company but the Supreme Court did not consider these germane to the purposes of the bill, namely, the appointment of a trustee in the place of the Farmers' Loan and Trust Company, for its failure to comply with the laws of the State of Illinois. The act of Congress clearly con-

templates, that there can be no removal under the separable controversy clause, unless that separable controversy can be "*wholly*" determined without the presence of the other defendants to the cause. If the bill could have originally been filed in the United States court by the Lake Street Company making only the Farmers' Company a defendant, and full relief obtained, then we grant that the cause might have been removable, but a decree so obtained would not have been binding upon the American Trust and Savings Bank nor upon the *cestuis que trust*, and the court would have been in the position of having changed the contract between the complainant and one of the trustees without the concurrence or without the presence in court of the other trustee or the beneficiaries.

It seems that a bare statement of the position with respect to this controversy is sufficient answer to the petition for removal. It is immaterial as to what attitude or position the defendants may take on the record, whether one of antagonism to plaintiff, one of indifference or one of consent. The question is whether the defendants were necessary and indispensable parties, and, on the assumption that they had not answered, then in such case, if they were necessary and indispensable parties, the cause was not removable. Complete, adequate and full relief could not have been granted in this case without the presence of the American Trust and Savings Bank and the Northern Trust Company.

Under the trust deed power of appointment was given under certain contingencies to the American Trust and Savings Bank. The complainant, however, asked the court to disregard this provision of the contract and to appoint a trustee, the question arising that if the

Farmers' Loan and Trust Company's appointment was originally void under the laws of the State of Illinois, then there was no vacancy under the trust deed which authorized the American Trust and Savings Bank to act. The decree removed the Farmers' Loan and Trust Company for failure to comply with the laws of the State of Illinois. No other theory appears for the removal of the Farmers' Loan and Trust Company except that for failure to comply with the laws of the state. The court gave the Farmers' Company time within which to determine whether it would comply with the laws of the state. It refused to comply and then this decree was entered.

As was said by the court in the case of

Wilson v. *Oswego Township*, 151 U. S., 67,

"considering the character of the relief sought by the original bill and the situation of the parties, it cannot be properly said that the whole subject-matter of the suit was capable of being finally determined between the plaintiff on the one side and Montague and the Oswego Township on the other, without the presence of the Union Savings Association, so as to warrant the removal as a separable controversy."

In that case it is said that the only parties whose presence would not defeat the jurisdiction of the United States court are those who are merely formal or nominal parties. In the Wilson case the court quotes from the opinion of Mr. Justice GRAY in the case of

Torrence v. *Shedd*, 144 U. S. 527,

wherein it was said: "By the settled construction of this section the whole subject matter of the suit must be capable of being finally determined as between them and complete relief afforded as to the separate cause of

action without the presence of others originally made parties to the suit."

And in

Merchants Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S. 368

this court again reaffirms the doctrine in the case of *Wilson* v. *Oswego Township*, *supra*. In the Merchants Cotton Press Company case the court also held that the right to remove must be determined by the pleadings at the time the petition is filed.

There can hardly be a question that the matter in controversy in this case was as to the right of the complainant to have a new trustee appointed in place of the Farmers' Loan and Trust Company. Around that controversy were the three defendants on the one side and the Lake Street Company on the other. The Lake Street Company insisted that it had the right to have that trustee appointed and independent of any right vested in the American Trust and Savings Bank in the trust deed to make the appointment, and it also had the right, if the court upon the hearing of the bill should determine upon the removal of the Farmers' Company, to have the court compel the appointment of a new trustee by the American Trust and Savings Bank, or in case it refused to make the appointment, then to reserve to itself, as it did, the power to make the appointment.

To appoint a new trustee and remove the old was to change the contract in an important particular. Many interests may have been consulted in the original appointment, and before that contract could be changed by decree of the court it was necessary that all parties having a right to be heard should be before the court or be represented, and for that purpose the American Trust and

Savings Bank was made a party as the trustee, and the Northern Trust Company as the holder of 90 per cent. of the bonds.

In

Hanrick v. *Hanrick*, 153 U. S., 192,

opinion by Mr. Justice Gray, the court referred to the different acts of Congress, beginning with the act of 1789, in regard to the removal of causes, and reaffirmed the doctrine that the controversy must be wholly between citizens of different states, and one where complete relief would be afforded without the presence of other persons originally made parties to the suit.

As said by the court in the case of

S. C. T. R. R. Co. v. *Trust Co.*, 82 Fed. Rep., 124,

that "an indispensable party is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests or leaving the controversy in such a situation as that a final determination may be inconsistent with equity and good conscience." And that "every indispensable party must be brought into court, or the suit will be dismissed."

It was strenuously contended by counsel for plaintiff in error in the three state courts where this suit has been heard that not only were the American Trust and Savings Bank and the Northern Trust Company necessary parties, but that other holders of bonds should have been made parties to the suit. It appears from the opinion of the Supreme Court and also from this record that the counsel for William Ziegler, one of the bondholders, appeared all through this litigation vigorously and strenuously contesting the right of the complainant to have the Farmers' Company removed as trustee.

Upon the question whether the contract should be changed and a new trustee appointed, there might be a variance of opinion. Some holders of bonds might be in favor of that proposition, and some against. The remaining trustee might be in favor of the proposition or might be against it, but as to what attitude they might take when they came to file their answer is immaterial on the question as to removability of the cause. They were made defendants in the bill for the reason that they had a right to be heard upon the question whether that contract should be changed. The complainant could not say upon which side of that controversy the defendants would arrange themselves, but the complainant was required to make all necessary parties defendant so that a decree might be entered that would afford the complainant full and complete relief. There could be no splitting up of the cause and decree entered against the Farmers' Company removing it as trustee, and then compel the complainant to take another proceeding making the holders of the bonds and the other trustee defendants to confirm the decree removing the Farmers' Company. The law does not favor such continuous and vexatious litigation, and if the complainant should meet the same difficulties it has met in this case it would be years before it would accomplish the purpose sought by the bill and relief which it is found to be entitled.

In

Thurber v. *Miller*, 67 Fed. Rep., 371,

it was held that the cause of action was the subject-matter of the controversy and that is for all the purposes of the suit, whatever the plaintiff declares it to be in its pleadings. Citing

Railroad Co. v. *Ide*, 114 U. S., 52.
Torrence v. *Shedd*, 144 U. S., 527.

In

Barth v. *Coler*, 60 Fed. Rep., 466 (C. C. A.),

held that there could not be a removal on the ground of separable controversy, "unless the cause of action sued upon is capable of separation into two or more independent suits, one of which is wholly between citizens of different states in such sense that it may be fully determined as between them without the presence of the other parties to the record."

In

Beach's Modern Equity Practice, Sec. 59, it is said: "In a suit by stockholders of a railroad company to prevent a trust company, to whom a mortgage on the road has been given, from delivering some of the bonds secured by the mortgage and to have such bonds canceled, the trust company is a necessary party to the controversy."

In

Railroad Co. v. *Ide*, 114 U. S. 52,

the court said: "The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible."

And it was stated also in that case that the claim for the right to removal was based upon the fact that the company had presented a separate defense and filed a separate answer tendering separate issues to the trial, and the court said: "This it has been sufficiently decided is not enough to introduce a separate controversy into the suit within the meaning of the statute."

In

Torrence v. *Shedd*, 144 U. S., 527,

the court in speaking on the subject of the separability of the cause and referring to the case of *Fidelity Insurance Co.* v. *Huntington*, 117 U. S., 230, and *Graves* v. *Corbin*, 132 U. S., 57, said:

"What the plaintiff wants is not partial relief settling his rights in the property as against this defendant alone, but a complete decree which will give him a sale of the entire property free of all encumbrances and a division of the proceeds as the adjusted equities of each and all the properties shall require. The answer of this defendant shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which the plaintiff seeks requires the presence of all the defendants, and the settlement, not of one only, but of all the branches of the case."

So in the case now before the court, the complainant did not seek the settlement of one branch of the case but of all branches of the case.

And in the Torrence case said: "As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint.'"

The same doctrine has been again reaffirmed in the case of

Powers v. *Chesapeake & Ohio Ry. Co.*,
169 U. S., 96.

In

Watson v. *Railway. Co.*, 73 Fed. Rep.; 1,

the court said in speaking of the separability of the causes of action that "under this clause there must exist in the suit a separate and distinct cause of action upon which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other."

In

Putnam v. *Ingraham*, 114 U. S., 57,

the court said: "The fact that Morgan has not answered but is in default is unimportant. The suit is still on joint causes of action, and the plaintiff, if he sustains the allegation of his complaint at the trial, would be entitled to a joint judgment against all the defendants. The default places the parties in no different position in reference to removal than they would occupy if Morgan had answered and set up an entirely different defense from that of the other defendants. A separate controversy is not introduced into the case by separate defenses to the same cause of action."

And the same doctrine was held in

Brooks v. *Clark*, 119 U. S., 502,

where a default was entered against one defendant and judgment, but the court held that in principle the case was like that of *Putnam* v. *Ingraham*.

In

Construction Co. v. *Cane Creek*, 155 U. S., 283,

the court said: "The substantial object of the suit was to obtain possession of the bonds. The Deposit and

Trust Company was the party in possession, and although it claimed no interest in the bonds as against the plaintiff and its co-defendant, yet possession could not be enforced in favor of the plaintiff except by a decree against it."

So in this case a decree could not be enforced appointing a new trustee except that the decree should be against the American Trust and Savings Bank. The mere removal of the Farmers' Company as trustee would not furnish the complete relief to which the complainant was entitled. The object was to have a new trustee appointed that could act under the laws of the State of Illinois, and to accomplish that object it was necessary to enter a decree against the American Trust and Savings Bank, as the court did do in this case, and compel it to appoint a new trustee, and in case of its failure the court reserved to itself the power to make the appointment.

In

Thayer v. *Life Insurance Co.*, 112 U. S., 717,

it was sought to enjoin a trustee in a trust deed from making a sale of certain property, and Mr. Justice HARLAN, in speaking for the court, said: "The trustee was not a merely nominal party. The object of the suit was to prevent him from selling the property under the power given in the deed of trust. The relief asked could not have been granted without his being before the court. There was no separable controversy between the complainants and the other defendants touching the sale of the property, which could have been determined between them without the presence of the trustee. He was, therefore, an indispensable party defendant. Whether he had the right and was under a duty to sell the property was a

controversy in which all the parties to the suit were interested."

The relief asked in this case could not have been granted without the American Trust and Savings Bank being before the court as well as the Northern Trust Company, and as stated in the Thayer case, it was an indispensable party defendant.

In

Hicklin v. *Marco*, 56 Fed. Rep., 549,

the court, in defining "indispensable parties," said that they were parties "who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

It needs no statement to say that a final decree in this cause would leave the case in such condition as would be wholly inconsistent with equity and good conscience unless the American Trust and Savings Bank and the Northern Trust Company were made parties to the controversy.

In

Thurber v. *Miller*, 67 Fed. Rep., 373,

the court, in speaking of the attitude of the co-defendant in the cause, said: "It makes no difference whether they admit or deny the rights of complainants; their presence is, nevertheless, indispensable to a complete determination of the controversy."

And in

Shields v. *Barrow*, 17 Howard, 130,

in speaking of the rescission of a contract, the court said: "For if only a part of those interested are before the court, a decree of rescission must either destroy the rights

of those who are absent or leave the contract in full force as respects them."

And in

Reno on Non-Residents, Sec. 129,

it is said: "No very satisfactory definition of indispensable parties can be given, but they may be broadly described as parties whose interests are so interwoven and bound up with other parties that no judgment or decree can be made without necessarily affecting them."

In

Gregory v. *Stetson*, 133 U. S., 579,

it was said: "In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit."

II.

THERE WAS NO FEDERAL QUESTION THAT ENTITLED THE PLAINTIFF TO REMOVAL OF THIS CAUSE TO THE UNITED STATES COURT.

The plaintiff in error sought to raise a Federal question in this cause by setting forth the fact that it had filed a bill to foreclose the trust deed in the United States court prior to the time the defendant in error, the Lake Street Company, filed its bill in the Superior Court of Cook County to remove the Farmers' Company as co-trustee. No claim was made in the petition that there had been any service of process or that the court had in any manner acquired jurisdiction over this defendant. The process was taken out and held by complainant's solicitor until after process was served in the state court. If this could be done then there is hardly a case in which the defend-

ant or defendants could not inject a Federal question, and hence the ruling of the court in numerous cases, that as to whether a Federal question is involved must be determined by the complainant's or plaintiff's pleadings. We are to take the bill filed in this cause and ascertain whether a Federal question was involved when that bill was filed.

The injunction granted in the cause was served on the morning of January 30th, and the writ or summons on February 6th. No service was had in the foreclosure case until February 18th. At the time the service was had in the foreclosure case the injunction in this case was still in full force. It had not been modified by the state court nor had it been modified by the United States court after the transcript had been filed in that court.

In

Postal Tel. Co. v. *Alabama*, 155 U. S., 482,

it was said: "It is equally well settled that under the provisions above referred to of the existing act of Congress no suit can be removed by a defendant from a state court into the Circuit Court of the United States, as one arising under the constitution, laws or treaties of the United States, unless the fact that it so arises appears by the plaintiff's statement of his own claim, and that a deficiency in his statement in this respect cannot be supplied by allegations in the petition for removal, or in subsequent pleadings in the case."

Citing

Tennessee v. *Bank of Commerce*, 152 U. S., 454.

Chappell v. *Waterworth*, 155 U. S., 102.

In the Chappell case the suit was an action of ejectment in the ordinary form, merely describing the land and alleging the ouster of the plaintiff by the defendant, and the court said: "So far as the declaration shows, the only question in the case might be merely whether the plaintiff had any title or whether the defendant had taken possession."

And it was said by Chief Justice MARSHALL in the case of

Osborn v. *United States Bank*, 9 Wheaton, 824,

"The questions which the case involves, then (*i. e.*, when the action was brought), must determine its character, whether those questions be made in the cause or not."

On the authority of *Chappell* v. *Waterworth*, the case of

East Lake Land Co. v. *Brown*, 155 U. S., 488,

was reversed and remanded on the ground that it must appear by plaintiff's statement of his own claim that a Federal question is involved, and if it does not so appear the want cannot be supplied in a petition for removal or in subsequent pleadings.

In the case of

Oregon Short Line Ry. v. *Skottowe*, 162 U. S., 490,

the court said: "That the present case comes within the rule that the Federal question, or the Federal character of the defendant company, must appear from the complaint in the action in order to justify a removal, and that such Federal question or character does not so appear. There is no propriety in further considering that rule because the reasons for it were fully set forth in the case

of *Tennessee* v. *Bank*, 152 U. S., 454, and again in the very recent cases of *Chappell* v. *Waterworth*, 155 U. S., 102; *East Lake Land Co.* v. *Brown*, 155 U. S., 488, and *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S., 482."

And the court said "that the conclusion reached in those cases may be briefly stated thus: Under the acts of March 3, 1887, and August 13, 1888, a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the Circuit Court of the United States, as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings."

Under the above authorities the petitioner did not by setting forth the mere fact that a foreclosure bill had been filed succeed in raising a Federal question.

III.

THE DOCUMENT PURPORTING TO BE A BOND FOR REMOVAL WAS NOT IN COMPLIANCE WITH THE ACT OF CONGRESS. THE ACT REQUIRES THAT THE PARTY SHALL PETITION THE COURT IN WHICH THE CAUSE IS PENDING AND "SHALL MAKE AND FILE THEREWITH A BOND WITH GOOD AND SUFFICIENT SURETY."

The act of 1789 providing for removal of causes states that the parties should "offer good and sufficient surety for his entering into such court" * * * etc.

U. S. Statutes at Large, Vol. 1, p. 79, Ch. 20.

The act of 1866 also provided that the party should "offer good and sufficient surety for its entering into such court" * * * etc.

U. S. Statutes at Large, Vol. 14, p. 306, Ch. 288.

The act of 1867, known as the "Local Prejudice Act," provided for filing petition for removal and required the party to "offer good and sufficient surety for its entering in such court" * * * etc.

U. S. Statutes at Large, Vol. 14, p. 558, Ch. 196.

The act of 1875 changes the provisions of the former act by providing that the party "shall make and file therewith a bond with good and sufficient surety."

It will be noticed by the court that Congress saw fit to require in the act of 1875 that the party should file a bond, and not, as in the former acts, offer good and sufficient surety, but that he should "make and file a bond." Now, a document signed by parties who are not parties to the record and in which no principal is named, is certainly not a bond signed by the petitioner. If the petitioner had signed a bond by his attorneys and had been named as the principal, then there might be some possible claim for saying that it was upon its face a compliance with the act of Congress. It certainly could not be said that if the two parties who signed that document purporting to be a bond had signed the petition that such petition was in compliance with the act of Congress.

The Superior Court and the Appellate Court of Illinois, and the Supreme Court have construed the act of Congress to mean just what it says, that the petitioner "shall

make and file therewith a bond," and not that any person could file a document purporting to give security.

When the act of Congress provided that the petitioner shall make and file therewith a bond, it meant that the petitioner should make and file a sealed instrument, and not that somebody else might make and file a sealed instrument. The petitioner itself was required to present a sealed instrument to the court, made by itself, and with good and sufficient surety. It is not necessary that there should be two sureties, but one surety at least. Certainly a bond presented to the court signed by the petitioner alone could not be held to be a compliance with the act of Congress, neither should an instrument with a surety not signed by the petitioner, either in person or by attorney, be held to be a compliance with that act. The petition and bond, under the act and rulings of this court, became a part of the record, and to make that record complete the complainant is entitled to know not only that the petition has been signed by the party desiring the removal, but also that that petitioner has given a bond with a sufficient surety. To say that to give surety is a compliance with the act is wiping out the provisions of the act which require the filing of a bond by the petitioner. It should also be borne in mind that this petition and bond were filed in the State of Illinois, where it has been the uniform ruling since the passage of the act in 1875 that that act required the petitioner to make the bond. The state court was bound by the decision of the Supreme Court of the State of Illinois upon this question and was fully justified in denying the removal upon that ground alone. But the court, however, denied the removal upon both grounds that there was no separable

cause of action and the bond was not in compliance with the act of Congress.

See opinion of Judge PAYNE (Rec., 663).

As to the bond Judge PAYNE said: "If the statute had said that the party petitioning might furnish security it might be one for construction, but the language is should 'make and file a bond.' Now, I do not think it can be held that when a plaintiff is required to make and file a removal bond that John Jones and Tom Brown may make and file such a bond for him."

In *Bank* v. *Insurance Co.*, 53 Fed. Rep., 161, it is said: "*Strictissimi juris*, if a party make a bond, it should be his bond."

In

Austin v. *Gagan*, 39 Fed Rep. 626,

opinion by Judge SAWYER, it was said, in passing on the question as to the sufficiency of the bond for removal of the cause: "The paper filed as a bond was so radically defective in matters of substance that it was no bond at all. Consequently no bond was filed till a month after the stipulated extension of time to answer had expired and two months after the lapse of the statutory time. It was therefore without effect."

The court then refers to the decision of Judge Gresham in *Burdick* v. *Hale*, 7 Bissell, 96, where the bond had no sum specified, the place for the amount being left blank, and said: "Circuit Judge Gresham, and I think rightly, held the defect to be fatal, as the court was not authorized to dispense with any substantial condition to a removal required by the act."

The court then quoted from Field on Jurisdiction of the Federal Courts, as follows: "If the bond is mani-

festly defective, as where no sum for the penalty is inserted, this would be ground for remanding the case to the state court from which it come."

In

Steger v. *Steger*, 165 Ill., 579,

the court held that the right to appeal the cause was purely statutory, and that section 90 of the Practice Act of Illinois provides that "any party to such cause shall be permitted to remove the same to the Supreme Court by appeal," upon certain conditions. That the party who appealed in that cause was not a party to the suit, and, therefore, no right was given to him by statute.

In

Tedrick v. *Wells*, 152 Ill., 214,

appeal was prayed by the "plaintiff" and was granted upon the plaintiff filing a bond within sixty days. The action was brought in the name of the plaintiff Tedrink for the use of another party. And the court held that: "The bond must be filed by the person praying for and obtaining the order for appeal. Where an action brought in the name of one person for the use of another is appealed, the nominal plaintiff must be properly in court before a judgment can be rendered in the case." The failure of the party to whom the right of appeal was given in that case to file a bond within the time fixed by the order allowing the appeal was fatal to the right.

The Supreme Court of Illinois, in the case at bar, in passing upon the question of the removability of the cause, said: "The petition for removal was signed by the appellant, the Farmers' Loan and Trust Company, one of the defendants in the court below, but the bond filed with such petition for removal was not signed by the appellant. This condition of the bond justified the court in denying the motion for removal of the cause."

In

Railroad Co. v. *Fitzgerald*, 160 U. S., 583,

it was said by Mr. Chief Justice FULLER in quoting from *Robb* v. *Connolly*, 111 U. S., 624: "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them."

IV.

THE QUESTION AS TO THE REMOVABILITY OF THE CAUSE TO BE DETERMINED BY THE RECORD AS MADE IN THE STATE COURT. IT HAS THE RIGHT TO DECIDE THAT QUESTION FOR ITSELF, AND IS ONLY SUBJECT TO REVIEW BY APPEAL THROUGH THE SUPREME COURT OF THE STATE.

The state court passed upon the question as to the removability of this cause and retained jurisdiction thereof, and proceeded to a final decree. It is true that after the court denied the motion made in writing by the petitioner to approve the bond and grant the petition, the plaintiff in error filed a transcript of the proceedings in the United States court. In that court a motion was made to remand and denied. But under the decision of this court in

Railroad Co. v. *Fitzgerald*, 160 U. S., 556,

this does not affect the right of plaintiff to proceed with its cause in the state court. Each court has the right to proceed in its own way, and the case can then be brought to this court through the proper channels for final review and determination. The petitioner is not estopped from

claiming the right of removal from the fact that it has made a motion in the state court for the approval of its petition and bond, and from the fact that it proceeded to trial and presented evidence, and fully argued the case in the state court, and neither is the complainant estopped from asserting the right of the state court to proceed notwithstanding it made a motion in the United States court to remand the cause. It may be true, perhaps that after counsel for petitioner had filed a written motion for the approval of its bond and for an order of removal, and had appeared and filed an answer and amended answer and went to a full hearing of the case, it was not in good taste to take a transcript of the proceeding to the United States court and seek to have that court take jurisdiction. It has been held that such action estopped it from afterwards filing a transcript in the United States Court.

Springer v. *Howes*, 69 Fed. Rep., 849.
Beadleston v. *Harpending*, 32 Fed. Rep., 644.

The petitioner might have filed its petition and its bond, taken a transcript and filed it in the United States court without having made any motion whatever for the approval of its bond or the granting of its petition; but it did make that motion in writing, it argued that question before the court by its counsel, it had a full hearing upon the question, and a judgment and finding was entered by the court upon that question.

V.

THE STATE COURT FIRST ACQUIRED JURISDICTION.

While we do not consider that the question is really involved upon the present motion as to which court first

obtained jurisdiction over this subject-matter, yet as counsel for the plaintiff in error will insist that a Federal question was involved by reason of filing the foreclosure bill, it is proper to call the attention of the court to a few authorities upon that question, which we think settles that question in favor of the jurisdiction of the state court.

A case almost identical with the case at bar was that of

U. M. L. Ins. Co. v. *University of Chicago*, 6 Fed. Rep., 443.

In that case a bill was filed in the state court restraining the foreclosure of a mortgage and to have the same set aside and declared void. Subsequently, but on the same day, a bill was filed in the Federal court for the foreclosure of the same mortgage, and charging that the defendant was conspiring with divers persons to defeat a recovery by denying that the defendant had any right to execute the mortgage. The process in the Federal court was served upon the following day, before 11 A. M., but the process in the state court was not served until 2 P. M. of the same day. In other words, the process in the Federal court was served three hours before that in the state court. The bill was filed in the Federal court after it was filed is the state court.

In the case at bar the bill was filed in the state court within a few minutes after the bill of foreclosure was filed in the United States court. Service was had of the process in the state court case on February 6th, and of the injunction writ on January 30th. No service was had of the process in the United States court, the foreclosure case, until February 18th.

Judge Drummond held in the Insurance Company case

that the Federal court had the right to go on and decide all questions which legitimately flowed out of the subject-matter of the controversy in that case, and said: "Although the bill was filed in the state court first, on the same day, the rule, I take it, is well settled that the right of a court to take jurisdiction of a party depends upon the service of process upon the party. If a party commence a suit and process is not served, it does not take effect as against the party defendant, howsoever long the process may remain in the hands of the officer. The process of this court being first served upon the defendants, the University of Chicago, and upon Boone, gave this court jurisdiction and the right to go on and foreclose this mortgage."

In

Moran v. *Sturges*, 154 U. S., 256,

Mr. Chief Justice FULLER, in referring to this question as to the right of the court to issue injunction, said: "It will be perceived that the principle invoked in such cases as *Gaylord* v. *Railroad Co.*, 6 Biss., 286, and *Insurance Co.* v. *Howell*, 24 N. J. Eq., 238, is, that courts for the purpose of protecting their jurisdiction over persons and subject matter may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect to property in their possession or identical controversies therein pending, by subsequent proceedings as to the same parties and subject matter in other courts of concurrent jurisdiction."

In the case of

Home Insurance Co. v. *Howell*, 24 N. J. Eq., 238,

to which Chief Justice Fuller referred, suit was brought to enjoin a party from prosecuting a suit in the United

States court for the Northern District of Illinois, upon two policies of insurance which under the bill it was sought to have cancelled on the ground that they had been fraudulently obtained, and the court held that: "Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may by the ordinary process of injunction and attachment for contempt compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction, and, of course, from prosecuting one commenced after the bringing of the suit in this court."

In

Farmers Loan and Trust Co. v. *Hughes*,
11 Hun, 130,

the plaintiff in error in this cause obtained an injunction enjoining Hughes from prosecuting the foreclosure of a mortgage in the United States court, for the reason that it had been appointed as his successor under a trust deed similar to the one now before the court.

The right to an injunction against the trustee from prosecuting a foreclosure suit was also sustained in the case of

Gibson v. *Trust Co.*, 58 Hun, 443.

This same doctrine is found in

High on Injunctions, Sec. 24, 2nd Ed.

As there was service of process in this case first by the state court, the state court had a right to proceed to a final decree, and to give full effect to the relief granted, and as incidental thereto under the final decree had a right to enjoin the further prosecution of the foreclosure case.

The fact that the parties were enjoined from further prosecution of a suit in the Federal court would not give the plaintiff in error a right to bring the record to this court for review. If such were the case, then it would make every decree rendered by a state court where parties were enjoined from prosecuting a suit in the Federal court subject to a review by this court.

VI.

IF THE STATE COURT WERE RIGHT AS A MATTER OF LAW IN DENYING THE MOTION FOR REMOVAL, IT IS IMMATERIAL ON WHAT GROUNDS IT BASED ITS DENIAL.

The Supreme Court of the state held that the American Trust and Savings Bank and the Northern Trust Company were necessary parties defendant, and that all interests were represented that were necessary to be represented in the litigation. As a matter of law the cause was not separable so as to be transferred, and therefore it is immaterial upon what ground the state court based its decision.

This was so held in

Kansas City Ry. v. *Daughtry*, 138 U. S., 298.

This cause has now been litigated through three courts and is now in the fourth court. The real question in the controversy all through has been as to whether or not the Farmers' Loan and Trust Company had the right to act as trustee under this mortgage because it had failed to comply with the laws of the State of Illinois. Three courts have held that it was not entitled to act, and that a new trustee should be appointed. That was, and is,

the real controversy in the cause. Other technical questions may be raised, and were raised in the state courts, but it will be found on examination of the various points that the whole controversy centered upon the question of the construction of a statute of the State of Illinois. Under this motion we think the case ought to be affirmed, if the court should hold that it has jurisdiction, on the ground that full hearing has been had upon the real points that were the subject matter of the litigation. The question as to the construction of this statute is not subject to review by this court. That being the real controversy between the parties and a matter upon which there can be no argument, the judgment should be affirmed, whether technically plaintiff in error is right upon the question of removability of the cause. Justice has been done between the parties, and it is apparent that this writ of error was taken for the purpose of delay. We think the authorities sustain us in the position that no Federal question is involved in this record by reason of the claim on the part of the petitioner of the right to prosecute the foreclosure proceedings.

As the question as to the construction of the state statute is not subject to review by this court it therefore leaves only two questions to be passed upon by this court, viz., as to whether the cause was separable, and as to whether the party had made and filed a bond as required by the act of Congress.

If the cause should be remanded to the state court upon the ground that the cause should have been removed, then when it is heard by the United States court the construction placed upon this statute by the state Supreme Court will undoubtedly be followed by the United States court. This means further and long delay to get to a

determination of the merits of the controversy, when it has already been determined by three state courts.

It is apparent from this record that the Farmers' Company is not acting in the interest of the *cestuis que trust*, nor of the settlor of the trust. The great mass of bondholders have agreed to a reorganization.

Great properties should not be wrecked by the method of procedure shown to have been taken by the Farmers' Company in this case. The merits of the controversy are solely and entirely with this defendant in error. The plaintiff in error should take and take that only which is nominated in the bond—no more and no less.

Courts do not look with favor upon the conduct of the Farmers' Company, as shown by the record in this case. It shows a persistent, constant and malicious effort to destroy and wreck the property of this defendant in error, and not to preserve it for the benefit of the *cestuis que trust* and of this defendant in error so far as its interests may appear. The stockholders of the defendant company, as well as the holders of over $7,000,000 par value of its securities, have an interest in seeing that this property covered by the trust deed is not wrecked and destroyed.

We respectfully submit that if the motion to dismiss in the opinion of the court cannot be sustained, that then the motion to affirm should be sustained and this litigation ended.

Respectfully submitted.

CLARENCE A. KNIGHT,

Attorney for The Lake Street Elevated Railroad Company.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Farmers' Loan and Trust Company,
Plaintiff in Error,
vs.
Lake Street Elevated Railroad Company, The American Trust and Savings Bank, and The Northern Trust Company, of Chicago,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

Motion to Dismiss the Writ of Error or for Affirmance.

Brief and Argument on Behalf of the American Trust and Savings Bank, Defendant in Error.

MAY IT PLEASE THE COURT:

The bill in this case sought the removal of the Farmers' Loan and Trust Company (plaintiff in error) as trustee, under a trust deed executed by the defendant in error (Lake Street Elevated Railroad Company), and running to the plaintiff in error and this defendant in error as trustees. That trust deed secured bonds in the usual form, and contained many elaborate provisions defining the powers and duties of the trustees.

This defendant in error was a defendant to the bill, and filed an answer thereto putting the com-

plainant, the Lake Street Elevated Railroad Company, to proof of all of its charges against the plaintiff in error. The Superior Court of Cook County, Illinois, rendered a decree removing the plaintiff in error from its trusteeship, enjoining it from doing any further acts as trustee, and directing this defendant in error as trustee to appoint a new trustee according to the terms of the trust deed. From this decree the Farmers' Loan and Trust Company alone prayed and was allowed its separate appeal. Thus this defendant and its co-defendant in the trial court, the Northern Trust Company, were joined as appellees on the record on appeal in the Appellate and Supreme Courts of Illinois, and stand as defendants in error in this Court.

The interest of this defendant in error in the result of this case, arises solely from its position as a trustee of the trust estate created by the trust deed. This defendant in error owes to its trust the duty of presenting upon the present motion, such considerations as it is advised will throw some light upon the questions involved in this hearing.

The record discloses that the plaintiff in error asserts, that there was a separable controversy in this case solely between it on the one hand and the Lake Street Elevated Railroad Company on the other.

The record further discloses that the learned District Judge holding the Circuit Court of the United States for the Northern District of Illinois, considered this defendant in error and the Northern Trust Company as properly ranged on the same side with the Lake Street Elevated Railroad Company on the issues involved in the bill; that on that ground he permitted a transcript of the record to be filed in the Circuit Court, and denied a mo-

tion to remand the case to the Superior Court, although that court had prior to such first order, denied a specific motion (after protracted argument) of plaintiff in error for the removal of the case (certificate of evidence, p. 666).

No attempt will be made to give in full the record (or rather the bill of complaint, which is alone to be considered on the question of removability) upon which the position of this defendant in error must rest. All of the facts are accurately stated in the brief filed by counsel for the Lake Street Elevated Railroad Company. It is, however, proper to state, that the learned District judge has entirely mistaken the position of this defendant in error. Neither the bill in this case nor any part of the record discloses any attempt on the part of this defendant in error (the American Trust and Savings Bank) to prevent or interefere with a forclosure of the trust deed.

The charge that it has done so is based, so far as the question of the removal of the case is concerned, *solely* upon the allegation of the bill of complaint, that this defendant in error after a full investigation of the affairs of the mortgagor, refused to join as complainant with the Farmers' Loan and Trust Company in a proceeding for the foreclosure of the trust deed based upon certain defaults in the payment of interest. While the bill alleged that *certain bondholders* desired that plaintiff in error should be removed as trustee, *no such allegation was made respecting this defendant in error.*

Although this record does not disclose the whole of the progress of this case in the Federal Circuit Court, where the transcript of the record was filed, the litigation as the record discloses, is still pending in that court.

In view of the fact that the opinion of the Supreme Court of Illinois is, in any event, a conclusive interpretation of the statute under whose provisions the plaintiff in error was held to be incompetent to act as trustee, and was therefore removed, every consideration of expediency is on the side of the maintenance of the jurisdiction of the state court. It is obvious that the only question presented for determination by this Court is that of the jurisdiction of the state Superior Court; and that that in no way affects the *force* of the decision of the Supreme Court of the state, as a *construction* of the state statute.

Inasmuch as the case is one which was not removable, the writ of error in this case causes a serious delay in the final adjustment of the trust estate, and prolongs a condition of uncertainty and confusion which is harmful alike to the interests of the mortgagor and of the bondholders. Not only its realization of the value to the trust estate of an early termination of this litigation, but also its belief in the soundness of the position of the state courts on the jurisdictional questions involved, lead this defendant in error to present the following suggestions:

BRIEF.

I.

THE BILL DOES NOT DISCLOSE A SEPARABLE REMOVABLE CONTROVERSY.

(*a*) The removability of the case must be determined solely upon the case made by the bill.

Merchants' Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368, 384.

(*b*) The dominating purpose of the bill is the removal of the trustee and the appointment of a new trustee; all other questions are auxiliary and not severable controversies.

Desty Removal of Causes, 3d Ed., pp. 269–271.

Black's Dillon on Removal of Causes, § 144.

Corbin v. *Van Brunt*, 105 U. S., 576.

Shainwald v. *Lewis*, 108 U. S., 158.

Winchester v. *Loud*, 108 U. S., 130.

Torrence v. *Shedd*, 144 U. S., 527.

(*c*) The joinder of the co-trustee and the bondholders as defendants defeats the removal of any controversy involved in the bill. The co-trustee being a joint tenant is a necessary party.

Golder v. *Bressler*, 105 Ill., 419, 434.

The powers and duties of the trustees being *joint* powers the co-trustee is a necessary party.

Pennsylvania Co. v. *Bauerle*, 143 Ill., 459.

The co-trustee and bondholder defendants were necessary defendants to render relief under the bill complete and effectual.

Guion v. *Melvin*, 69 N. C., 244.

Wilson v. *Oswego Township*, 151 U. S., 56.

(*d*) Even if *proper* parties only the joinder of the co-trustee and the bondholder as defendants defeated removal.

A case is not removable of which the Federal courts could not take original jurisdiction.

Pittsburg, C. & St. L. Ry. Co. v. *Baltimore & Ohio R. R. Co.*, 22 U. S. App., 359.

Wetherbee v. *Stinson*, 18 U. S. App., 714.

In re Cilley, 58 Fed. Rep., 977.

In re Pennsylvania Co., 137 U. S., 451.

Railroad Co. v. *Davidson*, 157 U. S., 201.

The co-trustee cannot be ranged with the mortgagor.

Shipp v. *Williams*, 22 U. S. App., 380.

II.

THERE IS NO FEDERAL QUESTION INVOLVED.

The bill does not disclose any Federal question, and one cannot be injected into the case by the petition for removal.

Oregon Short Line, etc., Ry. v. *Skottowe*, 162 U. S., 490.

Walker v. *Collins*, 167 U. S., 57.

The alleged conflict between state and Federal courts does not involve a Federal question.

The petition for removal on the ground that a Federal question is involved must be by all defendants.

Thompson v. *C., St. P. & K. C. Ry. Co.*, 60 Fed. Rep., 773.

Black's Dillon on Removal of Causes, § 77.

III.

THE SUPERIOR COURT HAD JURISDICTION AND POWER TO DENY THE PETITION FOR REMOVAL, AND DID NOT LOSE JURISDICTION OF THE CASE BECAUSE THE FEDERAL CIRCUIT COURT SUBSEQUENELY ALLOWED A TRANSCRIPT OF THE RECORD TO BE FILED IN THE CIRCUIT COURT AND DENIED A MOTION TO REMAND.

The order denying the motion to remand was interlocutory and not *res adjudicata*.

Missouri, etc., R. R. v. *Fitzgerald*, 160 U. S., 556.

The question of removability in this case being one of law, only, the state court had power to pass upon it.

Gregory v. *Hartley*, 113 U. S., 742.

Burlington Ry. Co. v. *Dunn*, 122 U. S., 513.

C., C., C. & St. L. Ry. Co. v. *Monaghan*, 140 Ill., 474.

White v. *Holt*, 20 W. Va., 792; 111 U. S., 134.

The decision of the state court being correct, it did not lose jurisdiction by reason of the action of the Federal Circuit Court in allowing the record to be filed therein and denying a motion to remand.

Florence Sewing Machine Co. v. *Grover & Baker Co.*, 110 Mass., 70; S. C., 1 Holmes, C. C. Rep., 235; 18 Wall., 553.

Vannevar v. *Bryant*, 21 Wall., 41; S. C., 106 Mass., 180.

Johnson v. *Brewers Fire Ins. Co.*, 51 Wis., 570.

Chesapeake & Ohio R. R. Co. v. *White*, 111 U. S., 134.

ARGUMENT.

This case was not removable to the United States Circuit Court. There was lacking the requisite diversity of citizenship of parties. There was no Federal question involved.

The contention of plaintiff in error that there was a separable controversy is without merit, and no possible reason can be discovered in the bill for ranging the co-defendants of the Farmers' Loan and Trust Company against it, and with the complainant, the Lake Street Elevated Railroad Company.

It is submitted that the bill does not contain separable controversies; in fact it contains only one controversy, to which all parties of record are necessary parties. Even if the bill disclosed separable controversies, it is not removable, because of the presence of parties whose citizenship defeats removal.

I.

THE BILL DOES NOT DISCLOSE A SEPARABLE REMOVABLE CONTROVERSY.

Of course, the determination of the removability of the case must be determined solely upon the bill.

Merchants Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368, 384.

Graves v. *Corbin*, 132 U. S., 571, 585.

Stated briefly, the allegations of the bill are as follows:

"Your orator * * * shows * * * that at "the time said mortgage was so made * * * said "The Farmers' Loan and Trust Company, being such "corporation under the laws of the State of New York, "had not, prior thereto, nor has it since complied with "the laws of the State of Illinois. * * * That at the "time of the execution * * * and acceptance of "said trust under said mortgage, your orator did not "know that said The Farmers' Loan and Trust Company "had not complied with the laws of the State of Illi-"nois. * * *

"Your orator further shows * * * that one "William Ziegler, * * * conspiring * * * "with various persons * * * made a demand upon "said The Farmers' Loan and Trust Company, and said "The American Trust and Savings Bank, that they pro-"ceed to foreclose said mortgage. * * * That your "orators filed a bill * * * enjoining * * * said "The Farmers' Loan and Trust Company and The Amer-"ican Trust and Savings Bank from taking any action "* * * to foreclose said mortgage, under the request "* * * by said William Ziegler and others, repre-"senting 605 of said 610 bonds. Your orator further "shows * * * that it was informed by said William "Burry, as agent for said The Farmers' Loan "and Trust Company that * * * notwith-"standing that no other person was asking * * * "any action * * * that it proposed to and would "file a bill to foreclose the said mortgage for failure to "pay the interest upon the bonded indebtedness aforesaid. "* * * That notwithstanding the parties * * * "holding or representing the coupons on the bonds due "July 1, 1895, and January 1, 1896, have made no de-"mand or request upon said The Farmers' Loan and "Trust Company * * * other than said 610 bonds, "yet said The Farmers' Loan and Trust Company in "violation of its duty, and for the purpose of injuring "and destroying the property and assets of your orator, "intended to and will * * * attempt to foreclose "said mortgage or trust deed. * * *

"Forasmuch, etc., orator prays * * *

1st. "That a new trustee may be appointed by the

"court to act under and by virtue of said mortgage or "deed of trust, attached hereto. * * *

"2nd. That an injunction *pendente lite* may be issued "restraining and enjoining said The Farmers' Loan and "Trust Company from taking any proceedings or bring- "ing or prosecuting any suit or suits, or acting in any "manner whatsoever, under and by virtue of said mort- "gage or deed of trust, and that upon the final hearing "hereof said injunction may be made perpetual.

"3rd. That orator may have such other and further "and different relief as equity may require."

The three controversies other than the alleged Federal question, alleged in the petition for removal to be presented by this bill, are stated by the plaintiff in error in its petition as follows:

1. "A controversy concerning the right of your pe- "titioner to act as trustee under the mortgage, a copy of "which is attached to said bill of complaint."

2. "A controversy concerning the removal of your "petitioner as trustee under said mortgage."

3. "A controversy concerning the enjoining of your "petitioner from taking any proceedings, or bringing or "prosecuting any suits or acting under and by virtue of "the terms, provisions and conditions of said mort- "gage."

It is to be noted that each of these three statements of the questions raised by the bill, involves only the power and right of the Farmers' Loan and Trust Company to take any action whatever under the trust deed.

There was no pretense that there was in this bill any special or distinct contest over foreclosure, until the parties came before Judge Grosscup, before whom a foreclosure contest was *pending in another case*. When this bill was filed, as it distinctly alleges, there was already an injunction in force against bringing foreclosure at the instance of certain bondholders. The bill brought by plaintiff in error for foreclosure, was filed almost simultaneously

(within a few minutes prior) with this bill, and this bill therefore had and could have had nothing to do with that foreclosure bill, except as the latter happened to come within the general scope of the prayer of this bill.

As to parties, the only allegation of the petition is as follows:

"Your petitioner further shows that if the controversy "in this case is one and inseparable, then *that such con-* "*troversy is wholly between citizens of different states,* "*and can be fully determined between them and that* "*said controversy is between your petitioner on one part,* "*and the said Lake Street Elevated Railroad Company* "on the other part, and that said other defendants, the "the American Trust and Savings Bank and the Northern "Trust Company, are not *proper or necessary* parties to "this cause."

It will be noted that this, the only allegation of the petition as to parties, is one wherein the bill is treated as containing *but one controversy.* That of course is the contest over *removal of the trustee.* Yet jurisdiction was taken by the Circuit Court on the ground that there was jurisdiction of a *separable* controversy concerning foreclosure. (*Lake St. El. R. R. Co.* v. *Farmers' Loan & Trust Co.*, 72 Fed. Rep., 804.)

The dominating purpose of the bill is the removal of the trustee and the appointment of a new trustee, which becomes necessary upon such removal.

That this relief is sought cannot be denied. That it covers and includes all else cannot be fairly denied. Should the court, where there are no allegations in the petition for removal, of fraud and collusion in the framing of the bill, and where the relief asked is sustained by the allegations of the bill, declare that the bill is in reality filed merely to reach an end

auxiliary to the main relief asked? Clearly not. Yet the Circuit Court held that the dominant purpose of the bill in this case was to prevent a foreclosure by an injunction. (72 Fed. Rep., 804, 807.) The rule is that, in order to rest the determination of the question of jurisdiction on any other ground than that disclosed by the bill, it must be alleged in the petition for removal and proved, that the relief sought is not sought of right, but is asked merely to defeat Federal jurisdiction.

In *Warax* v. *C. N. O. & T. P. Ry. Co.*, 72 Fed. Rep., 637, the rule is thus announced:

"Plaintiff's petition seeks to hold the railroad company and Snyder, its engineer, as joint tortfeasors. If, on the statements in the petition he is able to do so, then the cause is not removable (*Railroad* v. *Wangelin*, 132 U. S., 599; *Pirie* v. *Tredt*, 115 U. S., 41; *Sloan* v. *Anderson*, 117 U. S., 275; *Plymouth Consol. Min. Co.* v. *Amador & S. Canal Co.*, 118 U. S., 264; *Hedge Co.* v. *Fuller*, 122 U. S., 535), unless it be made to appear to the satisfaction of the court that one of the defendants was fraudulently joined for the purpose of defeating the jurisdiction of the Federal court. *In order that such joinder should be regarded as fraudulent, it must appear by allegation and proof*, not only that it was made for the purpose of avoiding the jurisdiction of the Federal Court but also that the averments of the petition upon which the right to join the defendants is claimed, are so unfounded and incapable of proof as to justify the inference, that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action."

So, in *Hukill* v. *Maysville & B. D. Co.*, 72 Fed. Rep., 745, the Court says:

"The history of the cause conclusively shows that the co-defendants of the Chesapeake and Ohio Railway Company were joined for the purpose of avoiding the jurisdiction of this court. (See 65 Fed. Rep., 138.) But

"this alone would not justify the removal of the suit "against the Chesapeake and Ohio Railroad Company. "It must also appear, *either by the averments of the peti-* "*tion* that no cause of action is stated against the other "defendants, or that they are, in law, improperly joined, "or it must be shown by the proof that the averments of "fact upon which the joint liability of the co-defendants "* * * is asserted, are so palpably unfounded and "untrue as to make it improbable that the plaintiff could "have inserted them in his petition in a *bona fide* belief "that he could make proof of them on trial."

Upon this point, the Superior Court (Judge Payne) said in disposing of the petition and motion for removal:

"Now, as to the second point, it is probably true that "*the gist of this controversy is whether the Farmers'* "*Loan and Trust Company may act as trustee in this* "*state*, but it follows, I think, that no fair adjustment "*of that controversy* can be had without the American "Trust and Savings Bank being a party to the suit. "True it is, that if the court should hold that the Farm- "ers' Loan and Trust Company might act as trustee, "there would be nothing to do but to dismiss the bill. "If, on the contrary, it held that it could not exercise "that function, then the court would be in duty bound to "appoint *or require the trustee, the American Trust and* "*Savings Bank, to appoint another trustee.* Counsel "have argued with some force that one trustee is as "good as two. The fact remains that the parties "when this contract was made determined that they "required two trustees. They not only selected "two trustees, but went to the trouble of "providing, that in case of resignation or removal, or "ceasing or incapacity to act of one the other shall ap- "point a successor. It is not for the court to make con- "tracts for people. It cannot be urged that a second "trustee is not necessary. *It has been suggested that the* "*object of this bill, while not perhaps stated*—the object "of the bill, aside from the removal of the trustee, *is to* "*enjoin the Federal court from the foreclosure of the* "*mortgage.* It does not seem to me that that question "arises on this motion. I think this court would be slow

"to grant an injunction restraining the Federal court "from doing anything, and I should want a good deal of "argument to satisfy me that the state court had a "right to interfere with the Federal court on any such "question. If there be such an injunction, the state "court, I think, would be always open to hear a motion "to dissolve; so I do not think that that question is "properly before the court on this motion. Under the "circumstances, I am bound to decline to remove the "cause, and therefore deny the motion."

Judge Payne held the removal of the trustee to be the main object of the bill, and that that issue involved the appointment of a new trustee, and was therefore, one upon which this defendant in error was a necessary party *defendant*.

The Illinois citizenship of the American Trust and Savings Bank and of the Northern Trust Company necessarily defeat Federal jurisdiction over the sole controversy presented by the bill.

It is submitted that it appears on the face of the bill that the *dominant purpose* thereof is to remove the Farmers' Loan and Trust Company as a trustee, and that this defendant in error is a necessary party, and necessarily a defendant.

In fact Judge GROSSCUP says (72 Fed. Rep., 804, 806):

"*If the sole purpose of this bill were to remove the* "*Farmers' Loan and Trust Company as trustee* under "the trust deed, there could be no doubt of the *indis-* "*pensableness of either the bondholders or their remain-* "*ing trustee as parties to the suit.*"

The examination of the entire record (if such examination is permissible under the law) will not show a separable controversy. The attempt to inject into this discussion so much of the record as shows the foreclosure proceedings instituted by plaintiff in error in the Federal

court on the same day that this bill was filed, will not do. The question whether there is in this suit a separable controversy upon which plaintiff in error was entitled to a removal, must be determined exclusively by the state of the pleadings and the record in this case when the petition for removal was filed, and not by the allegations of that petition, or by any other proceedings had either in the United States or in the state court. Neither the petition for removal nor the answer filed by plaintiff in error to the bill, nor any other pleading than the bill itself, can be resorted to for the purpose of determining the existence or non-existence of a separable controversy.

This court, in *Wilson* v. *Oswego Township*, 151 U. S., 56, says, on p. 66:

"The question whether there is a separable controversy "warranting a removal to the Circuit Court of the Unit- "ed States must be determined by the state of the "pleadings, and the record of the case at the time of the "application for removal, and not by the allegations of "the petition therefor, or the subsequent proceedings "which may be had in the Circuit Court";

and, as said by this Court in *Barney* v. *Latham*, 103 U. S, 205, on pp. 215, 216:

"The right of removal, if claimed in the mode pre- "scribed by the statute, depends upon the case disclosed "by the pleadings as they stand when the petition for "removal is filed."

The subject was carefully considered, and the authorities reviewed in *Fergason* v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep., 177, thus:

"Under this clause of the statute regard is had solely "to the cause or causes of action declared upon and set "forth by the plaintiff in his petition or declaration. By "the rulings of the Supreme Court in *Ayers* v. *Wiswall*, "112 U. S., 187, 5 Sup. Ct., 90; *Railroad Co.* v. *Ide*, "114 U. S., 52, 5 Sup. Ct., 735; *Pirie* v. *Tredt*, 115

" U. S., 41, 5 Sup. Ct., 1034, 1161; *Starin* v. *City of* " *New York*, 115 U. S., 248, 6 Sup. Ct., 28; *Sloane* v. " *Anderson*, 117 U. S., 275, 6 Sup. Ct., 730; *Safe De-* " *posit Co.* v. *Huntington*, 117 U. S., 280, 6 Sup. Ct., " 733; *Plymouth Consol Gold Min. Co.* v. *Amador* " *& S. Canal Co.*, 118 U. S., 264, 6 Sup. Ct., 1034— " and other cases based thereon, it is well settled that the " question of the existence of a separable removable contro- " versy is to be determined upon consideration of the " allegations of the petition; that the defendants by sep- " arate answers or defenses, cannot create a separable " controversy, within the meaning of the statute, out of " a cause of action upon which the plaintiff has " declared jointly; and therefore the true query is " whether the case as made and set forth in the petition " or declaration of the plaintiff is or is not separable into " parts 'so that in one of the parts a controversy will be " presented with citizens of one or more states on one " side and citizens of different states on the other, which " can be fully determined without the presence of the " other parties to the suit as it has been begun.' *Ayres* " v. *Wiswall*, 112 U. S., 187, 5 Sup. Ct., 90. If the " plaintiff in fact counts or declares upon one cause of " action, and no more, then the case cannot contain a " separable controversy."

See, also, Black's Dillon on Removal of Causes, Sec. 141, under the caption, " *Separable controversy must appear from plaintiff's pleading.*"

a. *The minor questions involved as to foreclosure, etc., are not separable controversies.*

The proposition which this defendant in error presents, as the settled rule of the Federal courts, is that where there is a dispute over a question dependent upon and a part of, the main controversy in the case, such dispute is not a severable controversy. So in this case, the dispute about the right of the plaintiff in error to maintain a bill to foreclose for non-payment of interest, is auxiliary to,

and a part of the controversy over the removal of appellant as trustee.

Such a minor or auxiliary matter of difference, whether affecting all of the parties, as in this case, or only affecting some of the parties, as in some of the cases that are cited below, abides the jurisdiction over the main controversy.

It is not necessary to contend that under the bill relief could be had by way of an injunction against foreclosure, even if the bill did not seek the removal of plaintiff in error as trustee. Foreclosure by plaintiff in error was enjoined on the ground that such relief was necessary to make effectual its removal as trustee.

It was conceded that the controversy over the removal of the trustee was not removable to the Federal Court. (72 Fed. Rep., 804.) That being so, the Superior Court of Cook County had undoubted jurisdiction to retain and proceed with that controversy to final decree, if such controversy was the only or an inseparable controversy. The Superior Court has proceeded to a final decree removing the Farmers' Loan and Trust Company as trustee; and as *a necessary part of that decree*, it has enjoined that company from any attempted action under the trust deed in question.

The relief by injunction sought by this bill is merely subsidiary, and therefore, does not constitute a separable controversy within the meaning of the statute.

Desty Removal of Causes, 3d Ed., pp. 269-271, sections 96*x*, 96*y*.

Black's Dillon on Removal of Causes, Sec. 144.

In *Corbin* v. *Van Brunt*, 105 U. S., 576, this Court says:

"The real controversy is about the right to the pos-"session of the land in dispute," and this Court held "that "the whole case *depends* upon the question of title be-"tween the Van Brunts (of New York) on one side and "the New York defendants on the other. This contro-"versy was not removable. That of the other defend-"ants is a mere adjunct of the principal dispute. It can-"not exist separately. The case is therefore within the "principle of Removal Cases, 100 U. S., 457, decided "after the order under review was made. *Blake* v. "*McKinn*, 103 U. S., 336, and *Hyde* v. *Ruble*, 104 U. "S., 407. In no just sense can it be said that the plead-"ings present separate controversies, such as admit of "separate and distinct trials. If they do not, there could "be no removal under the second clause of the act of "March 3, 1875, C. 137, any more than under the "first."

So in the particular case at bar there could not be two hearings, one as to the removal of the trustee and one as to enjoining foreclosure. The hearing for the settling of the rights of the parties as to the removal of the trustee would include and cover the other issues as "mere adjuncts."

The subject-matters of the bill are cognate and interwoven and all of the relief prayed is necessary to attain the one object of the bill—the removal of plaintiff in error as trustee, and the nomination and appointment of a new and competent trustee.

See, also,

Shainwald v. *Lewis*, 108 U. S., 158.

Ellis v. *Sisson*, 11 Fed. Rep., 353.

In *Frazer* v. *Jennison*, 106 U. S., 194, this Court says:

"To entitle a party to a removal under the second

"clause of the second section of the act, there must exist "in the suit *a separate and distinct cause of action*, with "all the parties on one side of that controversy citizens "of different states from those on the other. *To say the "least*, the case must be one *capable of separation into "parts*, so that in one of the parts a controversy will be "presented with citizens of one or more states on one "side, and citizens of other states on the other, which "can be *fully determined without the presence of any "other parties to the suit* AS IT HAS BEEN BEGUN."

In *Winchester* v. *Loud*, 108 U. S., 130, this Court says:

"The case presents a *single controversy*, although it "involves the *determination of several questions*. It "may be that Winchester is the principal defendant in "interest, *but full and complete relief cannot be afforded "in respect to the single cause of action, to wit: the "trust, without the presence* of all the parties to the suit."

That was, like the present suit, a bill touching the administration of a trust and seeking the removal of certain of the trustees, and the rule there laid down governs this case.

In *Thurber* v. *Miller*, 14 U. S. App., 432 (67 Fed. Rep., 371, 373), the court (8th Circuit) of its own motion, examined the question of removal, and upon the point here under discussion says:

"A bill for the foreclosure of a mortgage which asks "for a decree for the amount of the mortgage debt * * * "and alleges that the lien of the complainant's mortgage "is prior and superior to the liens of *some* of the defend- "ants named in the bill, presents but a single cause of "action. The ascertainment of the relative rank of the "liens *is incidental to the main purpose of the suit*. The "cause of action is the subject-matter of the controversy, "*and that is, for all the purposes of the suit, whatever "the plaintiff declares it to be in his pleadings. Rail- "road Company* v. *Ide*, 114 U. S., 52, 56; *Torrence* v. "*Shedd*, 144 U. S., 537, 530. * * * The case "made by the bill is one that cannot be fully determined,

"and the relief sought obtained, without the presence of "the heirs and executors of the mortgagor, *and it makes* "*no difference whether they admit or deny the rights of* "*the complainant, their presence is nevertheless indispen-* "*sable to the complete determination of the controversy.*"

In *Torrence* v. *Shedd*, 144 U. S., 527, Mr. Justice GRAY formulated a general rule, which has been accepted in subsequent cases as expressing the law on this subject. He said:

"But in order to justify such removal on the ground "of a separate controversy between citizens of different "states, there must, by the very terms of the statute, be "a controversy which can be *fully* determined as between "them; *and by the settled construction of this section* "*the whole* subject-matter of the suit must be capable of "being finally determined as between them and *complete* "relief afforded as to the separate cause of action, with- "out the presence of others originally made parties to "the suit. See to the same effect *Deposit Co.* v. *Hunt-* "*ington*, 117 U. S., 280; *Bellaire* v. *Railroad Co.*, 146 "U. S., 117; *Hanrick* v. *Hanrick*, 153 U. S., 192; "*Barth* v. *Coler*, 60 Fed., 466."

Black's Dillon on Removal of Causes says (Sec. 144), after referring to the rule laid down by this Court in *Torrence* v. *Shedd*, *supra:*

"It appears, therefore, that the controversy which will "warrant the removal of the suit must be the main issue, "or at least a separable part of the main, principal or "original case, and not merely an incidental controversy, "which may arise during the progress of the cause. "* * * And if the main issue in the case—the prin- "cipal contention or question in controversy, upon the "solution of which the disposition to be made of the en- "tire case must ultimately depend—is single and in- "severable, and all parties are interested in it, in so far "as that the eventual determination of the rights and "liabilities of all of them must be settled by its settle- "ment, although the rights and duties attaching to them "may be distinct and even unlike, then it cannot be said

"that the case includes a separable controversy as to any "one of such defendants."

(*b*) But if it be conceded for the purpose of further argument that the bill discloses a separable controversy, it will be found that the cause is not removable, because of the presence on the record of this defendant in error and the presence also of the Northern Trust Company.

Whether it be contended that the removable controversy is one over *foreclosure*, or one over the *removal* of the plaintiff in error as trustee, the American Trust and Savings Bank as trustee, and the Northern Trust Company as a bondholder are *necessary* parties to the determination of such controversy, and, being citizens of Illinois, defeat removal of the cause.

It has been shown that this bill seeks the removal of one of the two trustees appointed by the trust deed.

To ascertain what the decree which removes one trustee means, or what the effect would be of a decree enjoining the Farmers' Loan and Trust Company "from taking "any proceedings or bringing or prosecuting any suit or "suits, or acting in any manner whatsoever under and by "virtue of said mortgage or deed of trust," as prayed by the bill, the duties, title and interest of this defendant in error, as trustee, must be examined.

What may be called the "stake-holder" cases, *where a neutral party, or even one disclaiming any interest is held to be a necessary party*, show that the question depends on the *necessity* of the joinder of such party in order to afford and make *effectual* the relief asked.

Wilson v. *Oswego Township*, 151 U. S., 56.
Thayer v. *Life Ass'n*, 112 U. S., 717.
Wetherbee v. *Stinson*, 62 Fed. Rep., 174.

By the common law, and under an express provision of the statutes of Illinois, the estate of trustees is held in joint tenancy.

Sec. 5, Chap. 30 (on conveyances), Rev. Stat. Ill., of 1874, reads as follows:

"No estate in joint tenancy, in any lands, tenements or "hereditaments, shall be held or claimed under any grant, "devise or conveyance, whatsoever, heretofore made "*other than to executors and trustees*, unless the prem- "ises therein mentioned shall expressly be thereby de- "clared to pass, not in tenancy in common, but in joint "tenancy; and every such estate, *other than to executors "and trustees* (unless otherwise expressly declared as "aforesaid) shall be deemed to be in tenancy in "common."

In *Golder* v. *Bressler*, 105 Ill., 419, 434, the Supreme Court of Illinois says:

"It is clear that by the common law, and also by an "express provision of the statute, the estate of trustees "is held in joint tenancy * * *"

Of course, as a joint tenant holding the legal title, this defendant in error is a necessary party to an action to determine the title of its joint tenant; and the title being held as a security, is a necessary party to a bill seeking to restrain the enforcement of the security.

In *Lambert* v. *Hyers*, 22 Ill. App., 616, the Court says:

"In a suit in chancery, upon a trust deed, in the na- "ture of a mortgage, the grantee in such deed, in whom "the legal title is vested, is an *indispensable party*. "*Walsh* v. *Truesdell*, 1 Ill. App., 126, and authorities "there cited."

This defendant in error is the party of the *second part* in the trust deed under discussion, and as the grantee of the legal title, and as one of the trustees in whom all right to foreclose is primarily vested, is an absolutely in-

dispensable party to this bill, affecting as it does the entire administration of the trust created by the trust deed. Let the provisions of the trust deed be briefly examined.

There is no survivorship under this trust deed. If one trustee fails, then by the express terms of the trust deed, his powers vest only in a new trustee to be appointed by the remaining co-trustee—*the remaining co-trustee cannot act alone.*

(*a*) The deed is made to *both* trustees.

(*b*) The conveyance "grants, bargains and sells" the property to *both* trustees and their successors.

(*c*) The *habendum* clause creates an estate in *both* trustees, "their successors and assigns, in trust nevertheless."

(*d*) The *proviso* is to the effect that upon payment of the bonds, the trust shall cease, and *both* trustees shall execute a discharge of the mortgage.

(*e*) The deed provides for the certification of the bonds issued, and to be issued, by *both* trustees.

(*f*) The instrument provides how an additional issue of bonds of over 6,500 (an additional issue is shown by the record to have been made) shall be issued, and then certified by, and disposed of under the direction of *both* trustees.

(*g*) *Both* trustees may appoint a *joint* agent to attend meetings of the board of directors, examine the works of the railroad company, with reference to the application and expenditure of the proceeds of the bonds.

(*h*) Insurance is to be effected in companies satisfactory to *both* trustees, the policies to be payable to the trustees, and kept by them.

(*i*) If default is made in the payment of principal or interest, *both* trustees *may*, under certain circumstances, act, and under other circumstances *shall* act.

(*j*) If default continues for six months, if indemnity is given to the trustees, *they* shall, under certain circumstances, *take possession of the road, operate it, appoint agents, pay taxes and indebtedness, etc.*

(*k*) If there is six months default, upon request in writing by a majority, and upon being indemnified to their satisfaction, *both* trustees may foreclose, etc.

(*l*) The right of action under the trust deed "is vested "exclusively in the *trustees*," and only in case of a refusal "on the part of the *trustees* to perform any duty "imposed on them by this indenture," can bondholders proceed.

(*m*) The trustees never need proceed at the request of bondholders, unless "evidence satisfactory to the *trust*-"*ees*" shall be furnished of the ownership of the bonds.

(*n*) "The *trustees* shall permit such necessary changes "to be made in the line of said railroad as may be in "*their* judgment advisable."

(*o*) The *trustees* may, under certain circumstances, release for purposes of sale any part of the real property covered by the mortgage, the proceeds to be invested in other property, to be subjected to the mortgage, or if not invested, to be turned over to the *trustees*.

(*p*) If proceeds reach the trustees, *they* shall apply the same to the purchase or redemption of bonds.

(*q*) "The *trustees* may consent to the release of that "part of the railroad within the south division of the "City of Chicago, upon such conditions as *they* may im-"pose."

(*r*) Neither of the trustees shall be required to take any steps in the execution of the trusts unless given reasonable indemnity by the bondholders, and the *trustees* shall be entitled to a reasonable compensation, etc.

(*s*) The word "Trustee or Trustees as used in this instrument shall be held to mean "*both trustees*.

Even if the Farmers' Loan and Trust Company were capable of acting, but is to be removed for mere abuse of its trust, and is to be enjoined from acting *pendente lite*, the restraint upon the co-trustee is certainly a restraint upon this defendant in error; for being *joint* trustees one cannot act alone.

All of the duties and powers enumerated above are *joint* powers and duties.

In *Pennsylvania Co. etc.* v. *Bauerle*, 143 Ill., 459, 474, the court says:

"The powers vested in the trustees must be executed "strictly, and where a trust or power is delegated to two "or more jointly, for mere private purposes, the con- "currence of all who are intrusted with the power is "necessary to its due execution; and this rule applies as "well to trusts coupled with an interest as to cases of "mere naked powers. [Citing] *Green* v. *Miller*, 6 Johns, "39; *Franklin* v. *Osgood*, 14 Johns, 527; *Sinclair* v. "*Jackson*, 8 Cow., 443; *Peter* v. *Beverly*, 10 Pet., 532; "*Lancashire* v *Lancahsire*, 2 Phillips, 165; *Leggett* v. "*Hunter*, 19 N. Y., 445; 2 Perry on Trusts (3d Ed.), "Sec. 493."

See, also,

McGeorge v. *Big Stone Gap Imp. Co.*, 57 Fed. Rep., 262.

Brinkerhoff v. *Wemple*, 1 Wend., 471, 474.

1 Lewin on Trusts, star page 606, Sec. 11.

(1st.) *This defendant in error is necessarily ranged and joined as a defendant to the bill, because the relief sought affects its powers.*

Joint powers cannot be executed by this defendant in error alone. Even after the removal of plaintiff in error this defendant cannot act alone. It must appoint, or there must be appointed under the provisions of the trust deed, a new trustee.

Enjoining action by its co-trustee necessarily enjoins this defendant in error. Such a proceeding will not lie unless both trustees are before the court. Such an attempt at injunction against some trustees without having their co-trustees before the court, was held bad in

Wall v. *Thomas*, 41 Fed. Rep., 620.

This defendant in error was necessarily a party defendant to a suit brought against the other trustee affecting the performance of the trust.

Barbour on Parties, 631.

Hutchinson v. *Ayres*, 117 Ill., 558.

Broadway National Bank v. *Adams*, 130 Mass., 431.

(2nd.) *This defendant in error and the Northern Trust Company were necessarily defendants, because, in order to obtain complete relief they must be bound by the decree removing plaintiff in error, and must be bound by the appointment of a new trustee.*

In *Guion* v. *Melvin*, 69 N. C., 244, the court says:

"We cannot agree with the District judge that the removal of one trustee and the substitution of another is "a thing which can be done on *ex parte* motion. Before "the constitution of 1868 it could only be done on a bill "in equity *to which the trustee and all the cestuis que "trust were necessary parties.*"

"It is a proceeding in which each of them may have "an important interest. It may be that the trustee has "made advances or incurred liabilities on the faith of "the trust property, or is entitled to compensation for his "services as trustee. And it may be that some or most "of the *cestuis que trust* desire him to continue to act as "trustee for their interests. Important questions of title "to property may be involved; it cannot be maintained "that such rights can be determined on an *ex parte* application by one or several only of the *cestuis que "trust*. Those who were not parties to the proceeding "for the removal of the trustee clearly could not be "bound by it, and any order so made would be a source "of litigation and confusion."

To similar effect are

Headrick v. *Price*, 10 Lea, 15.

Bear v. *Am. Tel. Co.*, 36 Hun, 400.

Broadway Bank v. *Adams*, 130 Mass., 431.

(3rd) This defendant in error insisted in its answer that the complainant was *not* entitled to the appointment of a new trustee by the Superior Court as prayed by the bill. In this position, which is a material and important controversy arising on the bill, the plaintiff in error and this defendant in error are certainly upon the same side of the case, *and both are against the complainant*, the Lake St. El. R. R. Co.

But certainly this defendant in error is at least a *proper* party defendant on all of the matters involved in the bill. Under the authorities its presence would defeat removal.

If there are controversies, separable or not involved in this case, upon which the parties cannot be so arranged that there will be complete diversity of citizenship between those on one side and those on the other side, this bill will not be one of which the United States Circuit Court would have *original* jurisdiction; and, consequently, it is not a removable case.

It has already been shown that the American Trust and Savings Bank, as trustee, as holder of an estate in common with the trustee sought to be removed; *and as the representative of the bondholders other than the bondholding defendant, the Northern Trust Company*, and that bondholder itself, are *absolutely indispensable parties*. But even if they are *proper* parties only, removal is defeated.

Under the removal act of 1887, as corrected August 13, 1888 (1 Sup. to Rev. Stat., 611, and notes—25 Stat. at Large, 433), a case is removable only where it is such a case that it would be cognizable if *originally* brought in the Circuit Court. For convenience the section on removals is quoted:

"Sec. 2. That any case * * * arising under the "Constitution or laws of the United States or treaties "* * * *of which the Circuit Courts of the United "States are given original jurisdiction* by the preceding "section * * * may be removed by the defendant "or defendants. * * *

"Any other suit * * * of which the Circuit "Courts of the United States *are given jurisdiction* by "the preceding section * * * may be removed into "the Circuit Court * * * by the defendant or de- "fendants therein *being non-residents of that state.*

"And when IN ANY SUIT MENTIONED IN THIS SECTION "there shall be a controversy which is wholly between "citizens of different states, and which can be fully de- "determined as between them, then *either one or more* of "the defendants actually interested in such controversy "may remove said suit into the Circuit Court." * * *

This case must be one of which the Federal courts would have *original* cognizance, under either one or other of the first two paragraphs of the above section, in order to sustain the petition for removal. The language of the statute is clear and unambiguous.

This case is one of which it cannot be successfully contended that the Federal courts would have *original* cognizance under the above section.

The presence of even a *proper party* who is not a *necessary* party defeats *original* jurisdiction, if he is a citizen of the same state as his adversary. To get rid of such objection, such *proper* party must be dismissed by the complainant out of the case.

In *Pittsburg C. & St. L. Ry. Co.* v. *Baltimore & Ohio R. Co.*, 61 Fed. Rep., 705, 712; 22 U S. A., 359, there was before the court the case of a proper party who was a citizen of the same state as his adversary. The Circuit Court of Appeals, Sixth Circuit, says:

"The Central Ohio was, perhaps, an unnecessary party.

"* * * In view of this attitude of the Central Ohio "toward the issues presented, we cannot say that it was "an immaterial party. It certainly was not so regarded "by the other litigants nor by the Circuit Court. Being a "*proper* party * * * it makes a cause in which a "corporation of Maryland and a corporation of Ohio are "are one side of the controversy, while another corpora- "tion of Ohio is a party upon the opposite side. This "arrangement operates to deprive the Federal court of "jurisdiction. The very late case of *Wilson* "v. *Oswego Tp.*, 14 Sup. Ct., 259 (151 U. S., 56, 65), "is a case much in point. There Federal jurisdiction "was held to be defeated as to a defendant whom the "court thought an unnecessary party to the relief sought "by the complainant, yet a *proper* party because of its "interest in the controversy. We are clearly of opinion "that while the Central Ohio was not a necessary party "to the accounting between the Baltimore and Ohio "Railroad Company and the Pittsburgh, Cincinnati and "St. Louis Railway Company, yet it was, in view "of its interest in the issues arising, upon that account a "*proper* party. The decree must be reversed, with di- "rections to the Circuit Court to dismiss the bill with "costs."

See, also,

Wetherby v. *Stinson*, 62 Fed. Rep., 173;
10 C. C. A., 243; 18 U. S. App., 714.

Cases arising under the act of 1875, and which may be cited as being apparently *contra*, are inapplicable, because the intent and effect of the acts of 1887-1888 were to restrict the number of cases removable to the Federal courts, and the rules applicable to them are radically different from those applying to the act of 1875 as respects removals.

In the carefully considered case of *In re Culley*, 58 Fed. Rep., 977, the Court says:

"There is authority to the point that the purpose of

"the act of 1875 was to make the jurisdiction of the "Circuit Court coextensive with the constitutional grant "of judicial power, except in cases in which the Su- "preme Court had exclusive jurisdiction (citing cases): "but however this may be, such was not the purpose of "the acts of 1887–1888.

"There is a wide difference between the removal pro- "visions of the act of 1875 and the acts of 1887–1888 as "will be seen upon examination. The act of March 3, 1875, "provided through section 1:

"'That the Circuit Courts of the United States shall "have original cognizance, concurrent with the courts "of the several states, of all suits of a civil nature at "common law or in equity when the matter in dispute "exceeds.' etc.

"Section 2 provided:

"'That in any suit of a civil nature, at law or in "equity, now pending or hereafter brought in any state "court, where the matter in dispute exceeds, etc., * * * "or *in which there shall be a controversy between citizens* "*of different states*, * * * EITHER *party may re-* "*move said suit* into the Circuit Court of the United "States for the proper district. And when in *any* suit "mentioned in this section there shall be a controversy "which is wholly between citizens of different states,' "etc.

"*It will be observed that the second section, which au-* "*thorizes removal, is broader than the first section, which* "*grants original cognizance upon the Circuit Court*, and "herein lies the difference between the acts of 1875 and "1887. It is manifest that under the act of 1875 suits "or controversies not originally cognizable in the Circuit "Court might ripen into a suit removable under section "2. It will be seen that in describing suits of a civil "nature at law or in equity, removable under section 2, "*there is no reference to the preceding section and there is* "*therefore in section 2 no reference to the suits of a civil* "*nature* at common law or in equity, described in section "1. * * * And it will be further seen that in the "last part of section 2 the provision is 'when in any suit "mentioned in this section there shall be a controversy,'

"etc. The removability, therefore, under the act of "1875 was to be determined upon the force of section "2, without any reference to the jurisdictional grant of "section 1, or to the common law phrase used therein. "Under *this section* (1875) there was a strong ground "for holding that *original* jurisdiction was not the test of "removability, and that ANY controversy between citi- "zens of different states which had taken the form of a "suit of a civil nature, at law or in equity, might be re- "moved and the weight of authority unquestionably sus- "tains this view.

"*But the jurisdiction of this court depends upon the "acts of 1887–88 and not upon the act of 1875.*

"We must therefore look to the acts of 1887–88 for "the purpose of determining whether jurisdiction exists "to administer justice in a probate proceeding of this "character.

"Section 1 of the acts of 1875 and 1887–88 are in sub- "stance the same, but as has been observed, there is a "wide difference between section 2 of the acts of 1887– "88, which authorizes removals, and section 2 of the act "of 1875. Section 2 of the acts of 1887–88 first "provides:

"'That any suit of a civil nature, at law or in equity, "arising under the Constitution or laws of the United "States, or treaties made or which shall be made under "their authority, of which the Circuit Courts of the "United States are given *original* jurisdiction by the "preceding section,' may be removed.

"It next provides:

"'That any other suit of a civil nature at law or in "equity, *of which the Circuit Courts of the United "States are given jurisdiction by the preceding* section, "and which are now pending or which may hereafter be "brought in any state court, may be removed into the "Circuit Court of the United States for the proper dis- "trict *by the defendant or defendants therein, being non- "residents of the* state.'

"IT WOULD SEEM THAT THE FIRST TWO CLAUSES OF "SECTION 2 CONTAIN ALL THE JURISDICTIONAL GRANT EM- "BODIED IN THE SECOND SECTION, AND DESCRIBE AND "LIMIT THE SAME, and in both instances refer directly to

"suits of a civil nature pending in the state courts, *of* "*which the Federal Courts are given jurisdiction by the* "*preceding section.* It is true that section 2 further "provides that: 'When in any suit *mentioned in this* "*section* there shall be a controversy which is wholly be- "tween citizens of different states, and which can be fully "determined as between them, *then either one or more* of the "defendants *actually* interested in such controversy may "remove.' * * * And this is followed by the further "clause that, where a suit is now pending, or may here- "after be brought, it may be removed on the ground of "local prejudice, etc. But it does not seem to us that "this enlarges the limit *stated in the second clause*, for "the reason that *there are no suits 'mentioned in this sec-* "*tion' aside from those embodied in the first and second* "*clauses of the section, in both of which reference is* "*made, as has been observed, to the preceding section;* "and we must assume that the third clause of section "two, which gives the right of removal to one of several "defendants, and the fourth clause, which gives the right "of removal of a suit on the ground of local prejudice, "*have reference to cases included within the first and* "*second clauses.* (Citing cases.)

"*In other words, the third clause gives the right of* "*removal to one of the several defendants, and the fourth* "*clause gives the right of removal on the ground of preju-* "*dice and local influence; or in other words still, the* "*first and second clauses of section 2 define the classes of* "*cases which may be removed, while* THE THIRD AND "FOURTH CLAUSES MERELY GIVE THE RIGHT OF REMOVAL "IN THE SAME CLASS OF CASES TO PARTICULAR PARTIES, "AND UPON PARTICULAR GROUNDS. The only enumera- "tion of removable cases is in the first part of the section, "and it is reasonable to assume that if it was intended to "enlarge the classes in the latter part of the section which "gives the right of removal to one of several defendants "as a matter of right and to all at any time before trial, "if local prejudice is established, it would have given "some intimation of the particular cases which were in- "tended to be covered, and which were not included "within the general terms embodied in the first and sec- "ond clauses.

" We are not unmindful of the fact that there is con-
" trary judicial expression in some of the circuits; but,
" having in mind that the distinct point has been deter-
" mined by the Supreme Court in the case last men-
" tioned " (*In re Pennsylvania Co.*, 137 U. S., 451,
" 454, 456), " and that the statute of 1887 was ' mainly
" designed for the purpose of restricting the jurisdiction
" of the Circuit Courts of the United States ' (*Smith* v.
" *Lyon*, 133 U. S., 315, 320), and as has been often de-
" clared by the Supreme Court, was ' to contract, not to
" enlarge, the jurisdiction ' (*Shaw* v. *Mining Co.*, 145
" U. S., 444, 449; *In re Pennsylvania Co.*, 137 U. S.,
" 451, 454), ' to restrain the volume of litigation pour-
" ing into the Federal Courts, and to return to the
" standard of the judiciary act ' (*Fisk* v. *Henarie*, 142
" U. S., 459, 467), we are not left in doubt as to the
" proper construction of the section under consideration.
" And it follows as a result that, as that part of section 2
" *which defines and limits the removable causes makes*
" *reference to the jurisdiction given by the preceding sec-*
" *tion, we must look to the preceding section for the pur-*
" *pose of ascertaining our authority in respect to the case*
" *now before us.*"

In re Pennsylvania Co., 137 U. S., 451, 456, this Court gives the same construction to section 2, and says, after quoting the act:

" Here the first two clauses expressly require an
" amount exceeding two thousand dollars. The third
" clause, in referring to ' any suit mentioned in this sec-
" tion,' evidently means the two first clauses of this
" section, and, of course, is limited to cases in which the
" matter in dispute exceeds two thousand dollars."

In re Cilley is quoted with approval by the court *In re Foley*, 76 Fed., 390.

In *Copeland* v. *Bruning*, 72 Fed., 5, 9, the Court says:

" The case of *In re Cilley*, 58 Fed., 977, contains an
" elaborate discussion of the question by Judge Aldrich,
" whose opinion is concurred in by Judge Colt. In that
" case it was held that the right of removal is restricted

" by section 2, of the acts of 1887–1888, *to the classes of* " *cases in which original jurisdiction is given by section* " *1.* * * *"

In *McNulty* v. *Connecticut Mut. Life Ins. Co.*, 46 Fed. Rep., 305, the court says:

" Under the act of 1887, as amended by that of 1888, " to justify a removal on the ground of diverse citizen- " ship *it must appear that the case is* ONE OF WHICH THE " FEDERAL COURT COULD TAKE JURISDICTION ORIGI- " NALLY, UNDER THE PROVISIONS OF THE FIRST SECTION OF " THE ACT. * * * As it does not appear that this " court would have had jurisdiction originally over this " cause, it cannot take it by removal, and the motion to " remand is, therefore, sustained."

The same rule is supported by the rulings of this Court in

Tennessee v. *Union & Planters Bank*, 152 U. S., 454.

Railroad Co. v. *Davidson*, 157 U. S., 201.

See, also,

Texas & Pacific Ry. Co. v. *Cody*, 166 U. S., 606, 609.

In re Stutsman, 88 Fed. Rep., 337, 341.

As this case stands now, it is one of which the Circuit Court could not take *original* cognizance, and lacking *original* jurisdiction, the same cannot be conferred by removal.

The bondholder, the Northern Trust Company, is at least a *proper* party, and necessarily a defendant in interest. Such is clearly the law.

Guion v. *Melvin*, 69 N. C., 244.

Sherman v. *Burnham*, 6 Barb., 403.

Headrick v. *Price*, 10 Lea, 15.

Bear v. *Am. Tel. Co.*, 36 Hun, 400.

And the American Trust and Savings Bank, trustee, having the legal title and being the proper representative before the court of the other bondholders, is likewise at least a *proper* party, and necessarily a defendant in interest.

Shipp v. *Williams*, 62 Fed. Rep., 4; 22 U. S. App., 380.
Broadway Bank v. *Adams*, 130 Mass., 431.
Wall v. *Thomas*, 41 Fed. Rep., 620.
Barbour on Parties, 631.
Guion v. *Melvin*, 69 N. C., 244.

They are not mere formal parties in any event because they have an actual interest in the controversy.

If this were an original bill in the Circuit Court the complainant would at least have to dismiss as to these parties, or suffer the dismissal of the bill.

Wetherby v. *Stinson*, 62 Fed. Rep., 173; 18 U. S. App., 714; 10 C. C. A., 243.
Hicklin v. *Marco*, 56 Fed. Rep., 549; 6 C. C. A., 10.

II.

THERE IS NO FEDERAL QUESTION INVOLVED.

The petition for removal states, as above shown, three controversies which it is claimed are involved *on the face of the bill*, and a fourth, which it seeks to inject into the bill as a "Federal question" by allegations of fact in the petition for removal.

This last contention may be summarily disposed of. *A Federal question to be ground of removal must be*

disclosed by the bill alone. The facts from which it arises cannot be added to the record by the petition for removal.

In *Oregon Short Line, etc., Ry.* v. *Skottowe*, 162 U. S., 490, 494, this Court says:

"We think that the present case comes within the rule "that the Federal question, or the Federal character of "the defendant company, must appear from the com- "plaint in the action in order to justify a removal, and "that such Federal question or character does not so "appear. There is no propriety in further considering "that rule, because the reasons of it were fully set forth "in the case of *Tennessee* v. *Union & Planters Bank*, "152 U. S., 454, and again in the very recent cases of "*Chappell* v. *Waterworth*, 155 U. S., 102; *East Lake* "*Land Co.* v. *Brown*, 155 U. S., 488, and *Postal Tel.* "*Cable Co.* v. *Alabama*, 155 U. S., 482."

See, also,

Walker v. *Collins*, 167 U. S., 57.

. lack's Dillon on Removal of auses, Sec. 112.

Florida v. *Charlotte H. P. Co.*, 74 Fed. Rep., 578, and cases cited therein.

If the alleged question were open to discussion it would be speedily seen that it was not a Federal question. If a Federal question arises every time a state court issues an injunction which may, or actually does, enjoin a person from prosecuting an action in a Federal court, the state court's power would be ridiculously curtailed. For the very moment such court attempts to control a person, that person is enabled to take the matter in controversy out of its control!

As already stated, plaintiff in error endeavored to inject into this suit a "Federal question" by alleging in

its petition for removal that this suit is an interference with the Federal court in which the foreclosure suit was instituted. The bill in this case in no way sought to interfere with the Federal court. It prayed that plaintiff in error should be enjoined from taking any proceedings, or bringing any suit, or acting in any manner under the trust deed. It is impossible to support upon that prayer the charge that the state court by this bill interfered with the Federal court. Courts of chancery have long asserted jurisdiction to enjoin parties from litigating in another forum.

"The injunction is directed not to the court, but to "the litigant parties, and in no manner denies the juris- "diction of the legal tribunal. It merely seeks to con- "trol the person to whom it is addressed. * * *"

1 High on Injunctions (3rd Ed.), Sec. 45.

And, again, in Sec. 46, the same author says:

"While, therefore, equity may in proper cases enjoin "suitors in another court when proceeding with their "cause, the injunction cannot operate upon or run against "the judge of such court."

The origin of this jurisdiction of a court of chancery and its exercise is discussed with his usual learning by Professor Pomeroy, in Vol. 3 of Equity Jurisprudence, Sec. 1360 *et seq.*

It is difficult to imagine how it can be seriously contended that plaintiff in error was entitled to a removal on the ground that this suit came within the language of the constitution and Federal statute, and is one

"arising under the constitution or laws of the United "States, or treaties made, or which shall be made under "their authority."

This Court, in *Starin* v. *City of New York*, 115 U. S., 248, in discussing this question, says:

"The character of a case is determined by the ques-
"tions involved. If, from the questions, it appears that
"some title, right, privilege or immunity, on which the
"recovery depends, will be defeated by one construction
"of the constitution, or of a law of the United States,
"or sustained by the opposite construction, the case will
"be one arising under the constitution or laws of the
"United States within the meaning of that term as used
"in the acts of Congress."

A case, however, does arise under the laws of the United States simply because a Federal court decided one way on the motion to remand, and the state court, upon the same question of law, decided another way.

Leather Manufacturers' Nat'l Bk v. *Cooper*, 120 U. S., 778.

State of Kansas v. *Bradley*, 26 Fed. Rep., 289.

Inex Mining Co. v. *Kinney*, 46 Fed. Rep., 832.

The doctrine is thus summed up by Judge THAYER in his monograph on Federal Courts, Sec. 22:

"A case is said to arise under the constitution
"and laws of the United States whenever its
"correct decision depends upon the construction
"of either, or whenever the constitution, laws,
"or treaties of the United States create or confer
"the right, privilege, claim or title on which the plaint-
"iff relies in whole or in part for a recovery. A case is
"one of Federal cognizance whenever it becomes neces-
"sary to construe the constitution, laws or treaties of the
"United States."

The law is summarized with equal brevity in Black's Dillon on Removal of Causes, Sec. 109, thus:

"It is not enough to bring a case within the Federal
"jurisdiction on the ground we are now considering
"(Federal question) that one of the parties bases his
"claim on the constitution or an act of Congress, or that

"the determination of the issue will involve the construc-
"tion or application of the Federal law. There must
"be a controversy or dispute between the parties, and
"that controversy must be not merely upon a question
"of fact, but upon the validity, interpretation, effect, or
"applicability of a law of the United States."

Applying any of the tests referred to, how can it be successfully contended that a bill (assuming it to have been the express purpose of that bill) to enjoin a defendant from beginning or prosecuting a suit to foreclose, involves a Federal question, because the defendant should perchance file its bill to foreclose in a Federal court? Certainly, in the issues raised by this bill there is none in the determination of which a question does or necessarily will arise under the Federal constitution or laws, and there is no controversy the determination of which will depend upon the solution of such question.

See

Black's Dillon on Removal of Cases, Sec. 110.

The only connection between the foreclosure bill referred to in the petition for removal and the bill in this case is, that to some extent they involve the same subject-matter, namely, the trust under the mortgage in controversy; and there is an evident possible conflict over this subject-matter between two original jurisdictions, *each* of which has taken independent jurisdiction.

In such a case the fact of the prior suit in the one jurisdiction is, if of any force whatever, *a matter of defense* in the subsequent suit in the other jurisdiction. It is as a matter of abatement or defense that it must be presented and not as a ground of removal.

Chittenden v. *Brewster* 2 Wall., 191, 197.

Service was first had in this suit. In such case the *first* suit is that in which service is *first* had, and the court in which that suit is brought is entitled to retain it, free from interference.

Desty Removal of Causes, Sec. 73a.

Rorer on Interstate Law (2nd Ed.), pp. 16, 17.

Union Mut. Life Ins. Co. v. *University of Chicago*, 6 Fed., 443. (This circuit: DRUMMOND, J.)

Ward v. *Todd*, 103 U. S, 327.

Moran v. *Sturges*, 154 U. S., 256.

Corell v. *Heyman*, 111 U. S., 176.

Taylor v. *Taintor*, 16 Wall., 366.

Foster v. *Bank*, 68 Fed. Rep., 723.

Sharon v. *Terry*, 36 Fed. Rep., 337.

Foley v. *Hartley*, 72 Fed. Rep., 570.

Merritt v. *Steel Barge Co.*, 79 Fed. Rep., 228.

Zimmerman v. *So Relle*, 80 Fed. Rep., 417.

The injunction writ in this case was served on plaintiff in error as the record shows, on the 30th of January, 1896. On the 31st of January plaintiff in error filed in the Superior Court its petition and bond for removal. On the 1st of February it filed its *written motion* for removal; on the 3d of February it urged its motion for such removal, and upon the denial of such motion, took an exception; made a motion for and was allowed time in which to file its certificate of evidence.

February 6th summons was served on plaintiff in error.

To recapitulate the facts as to the priority of the Superior Court bill the following is submitted:

U. S. CIRCUIT COURT.	SUPERIOR COURT.
Jan. 30, 10:35 a. m. Bill to foreclose filed and process issued to and retained by complainant's (plff. in error) solicitor in his possession until Feb. 18, 1896.	Jan. 30, 11 a. m. This bill filed and process and injunction issued.
	Jan. 30, 11:10 a. m. Injunction writ served on agent of plaintiff in error.
	Jan. 31. Appearance of plaintiff in error in Superior Court, its bond and petition for removal filed therein, and its written motion filed praying for order granting removal.
	Jan. 31. Appearance Northern Trust Co.
Feb. 1. Appearance and demurrer of this defendant in error	Feb. 1. Appearance of this defendant in error.
	Feb. 6. Service of summons on plaintiff in error.
Feb. 18, 1896. Service of summons on Lake St. El. R. R. Co. (deft. in error).	

The presentation of the bond and petition, the motions for removal, for time to file a certificate of evidence, and the argument before the Superior Court, constituted a general appearance giving the Superior Court jurisdiction over the parties and subject-matter prior to any jurisdiction over the same in the United States Circuit Court upon the bill to foreclose.

Sayles v. *N. W. I. Co.*, 2 Curtis, 212—Fed. case No. 12,421.

Tallman v. *B. & O. R. R. Co.*, 45 Fed. Rep., 156.

Wabash R. R. Co. v. *Brow*, 65 Fed. Rep., 941; 13 C. C. A., 222.

Caskey v. *Chenoweth*, 62 Fed. Rep., 712; 10 C. C. A., 605.

Construction Co. v. *Simon*, 53 Fed. Rep., 1.

See, generally, on appearance and jurisdiction:

Foley v. *Hartley*, 72 Fed. Rep., 573.

Howlett v. *S. C. L. I. Co.*, 56 Fed. Rep., 162.

Central Trust Co. v. *S. At. R. R. Co.*, 57 Fed. Rep., 3.

Moran v. *Sturges*, 154 U. S., 256.

But this inquiry is not controlling, because, whichever way it leads, it does not involve a Federal question.

Whether one court or the other has prior jurisdiction is not a Federal question.

Even if a Federal question were involved, the petition for removal was insufficient for removal upon that ground, because all of the defendants did not join.

Under the removal act of 1887 as corrected by the act of August 13, 1888, the only cases removable from state to Federal courts are those provided for as follows:

"Sec. 2. That any case * * * arising under the "Constitution or laws of the United States or treaties, "* * * of which the Circuit Courts of the United "States are given *original* jurisdiction by the preceding "section * * * may be removed *by the defendant "or defendants.*" * * *

"Any other suit * * * of which the Circuit "Courts of the United States are given jurisdiction by "the preceding section * * * may be removed into "the Circuit Court * * * by the defendant or de-"fendants therein, *being non-residents of that state.*

"And when IN ANY SUIT MENTIONED IN THIS SECTION "there shall be a controversy which is wholly between "citizens of different states, and which can be fully de-"termined as between them, then *either one or more* of "the defendants actually interested in such controversy "may remove said suit into the Circuit Court." * * *

(Then follows clause as to local prejudice.)

Stated briefly, under this act of 1887–1888 there are four classes of removable cases.

1. Those involving Federal questions and of which the Federal courts have original jurisdiction. These may be removed only by *all* defendants.

2. All other cases of which the Federal courts have original jurisdiction. These may be removed only by *all* defendants, and they must all be non-residents of the state where the action is brought.

3. *Cases of which the Federal courts would have original cognizance*, including *both* of the above classes, *where there is a separable controversy.* In such case one or more defendants, resident or non-resident, may remove the case.

4. Cases where local prejudice is alleged.

Unless this case comes under the third class of removable cases, as above stated, it can be removed *only upon petition of all the proper parties defendant.*

That it does not come under this third class has already been shown.

A case is removable on the ground that it contains a Federal question *only upon the petition of all the defendants.*

In *Thompson* v. *Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. Rep., 773, the court says:

"The first clause of section 2 of the removal act of "1875 (18 Stat., 471) is similar to the second clause of "section 2 of the act of 1887. (Supp. Rev. St., 812.) "The only difference between the two clauses is that "under the act of 1875 it is provided that either party "might remove the suit, while under the act of 1887 it "is provided that the *defendant or defendants*, being non-"residents of the state, may remove it. It was well set-

"tled under this clause of the act of 1875 that a removal "could not be effected unless *all* the parties on the same "side of the controversy united in the petition, and I "think there is no doubt that the same rule must be held "to apply to this clause of the act of 1887. *Ruckman* v. "*Land Co.*, 1 Fed., 367; *Smith* v. *McKay*, 4 Fed., 353; "*Rogers* v. *Van Nortwick*, 45 Fed., 513. It follows "that as one of the defendants in this action did not join "in the petition for removal, the case was not properly "removed to this court under this clause of the act of "Congress.

"The second clause of the second section of the act of "1875 provided that, wherever there should be a contro- "versy which was wholly between citizens of different "states, and which could be fully determined as between "them, then either one or more of the plaintiffs or de- "fendants actually interested in such controversy might "remove the suit into the Circuit Court. The third clause "of the second section of the act of 1887 is identical "with this clause of the act of 1875, except that the "words 'plaintiffs or' have been omitted. It is well "settled that this clause of the acts of 1875 and 1887 "governs that class of cases only *where there are two or* "*more controversies involved in the same suit*, one of "which controversies is wholly between citizens of dif- "ferent states. In the case before us there is but a single "controversy, a joint cause of action against all the de- "fendants, and hence the case would not be removed to "this court under this clause of the act."

We are aware of no decision of this Court upon this point. The almost unbroken line of authorities sustain the position contended for.

Black's Dillon on Removal of Causes, Sec. 77.

Desty Removal Causes, 3d Ed., Sec. 96a.

W. U. Tel. Co. v. *Brown*, 32 Fed. Rep., 337.

Rogers v. *Van Nortwick*, 45 Fed. Rep., 513.

Smith v. *McKay*, 4 Fed. Rep., 353.
Mayor, etc., v. *Independent Steamboat Co.*, 21 Fed. Rep., 593.
Texas & Pac. Ry. Co. v. *Young*—Tex. Civ. App.—27 S. W., 145.

III.

THE SUPERIOR COURT HAD JURISDICTION AND POWER TO DENY THE PETITION FOR REMOVAL, AND DID NOT LOSE JURISDICTION OF THE CASE BECAUSE THE FEDERAL CIRCUIT JUDGE SUBSEQUENTLY ALLOWED A TRANSCRIPT TO BE FILED IN THE CIRCUIT COURT AND DENIED A MOTION TO REMAND.

After plaintiff in error had submitted the determination of the sufficiency of the petition and bond to the Superior Court, and after its argument made in that court, and after the deliberate judgment of that court against plaintiff in error, it took a transcript, presented it to the United States Circuit Court, and obtained leave to file the transcript and docket the case.

Thereafter certain defendants in error appeared in the Circuit Court and made motions to remand.

The motion of this defendant in error was that the order of the Circuit Court permitting the filing of the transcript and the docketing of the case be set aside and vacated, and the case remanded. (Certificate of Evidence, p. 659.)

These motions to remand were denied by the Circuit Court (Judge Grosscup).

Counsel for plaintiff in error have assigned error here and have insisted that this order, obtained *after* an order

denying a removal in the state court is *res adjudicata*, even upon a collateral hearing, and that the Superior Court should have so considered it, and should have proceeded no further with this case. Anticipating that plaintiff in error will press upon this Court the same position it urged on this point in the Illinois Supreme Court, we go into this discussion at some length. The Federal Circuit Court is not an *appellate* tribunal over the state court. Its refusal to remand was not upon an appeal but in a proceeding entirely *collateral* to the state court proceeding.

In the first place, the order of the Circuit Court was purely interlocutory. *Non constat*, but that it has been reconsidered and set aside or vacated. The record does not disclose the final decree in the Circuit Court, and until final decree such an order is open to revision at any time.

In *Missouri, etc., R. R.* v. *Fitzgerald*, 160 U. S., 556, this Court says:

"We are thus brought to the remaining and most important question arising on this motion. Under the "act of Congress of March 3, 1887, C. 373, 24 Stat., "552, 553, as re-enacted, for the purpose of correcting "the enrollment, by the act of August 13, 1888, C., "866, 25 Stat., 433, 435, is the order of the Circuit "Court remanding the cause to the state court open to "review on the writ of error? If not, then we cannot "take jurisdiction to revise the proceedings of the state "court. *Nor can the inquiry be affected by the fact that "a motion to remand had been previously made and de-"nied. That order was subject to reconsideration, as "the question of jurisdiction always is until final judg-"ment, and indeed it was the duty of the Circuit Court "under the statute, if it appeared at any time that juris-"diction was lacking, to dismiss or remand as justice "might require.* 18 Stat., 470, C. 137, Sec. 5."

In the second place *the prior order of the Superior*

Court was an adjudication which was sought by the plaintiff in error, and the parties should be bound *by it and allowed to question it only upon appeal.*

The question whether or not this case was removable to the Federal courts is one of law, pure and simple.

The sole inquiry is whether the bill, the petition and bond for removal, presented, *as a matter of law*, a case removable to the Federal courts. It is not contended that, where upon the bill, or upon the petition for removal, the right to remove depends upon *the existence of certain facts*, the state court has any power to determine such facts.

But it is submitted that where the question of the right to remove is presented as a naked legal question of *general law*, arising on an admission of the facts stated in the bill, petition and bond, upon *the submission* of that question to the state court, its determination thereof should be binding collaterally. It is evident from the statutes and precedents that the state tribunal has at least *concurrent* jurisdiction to pass upon the sufficiency in law of the petition and bond.

In *Gregory* v. *Hartley*, 113 U. S., 742, 745, this Court says:

"The District Court (a state court) *was not bound to* "*surrender its jurisdiction until a case was made which* "*on the face of the record showed that the petitioners* "*were in law entitled to a removal.*"

In *Burlington Railway Co.* v. *Dunn*, 122 U. S., 513, 515, Mr. Chief Justice WAITE, after reviewing previous authorities, says upon this question:

"At the last term it was found that this question had "become a practical one, about which there was a differ- "ence of opinion in the state courts, and to some ex-

"tent in the Circuit Courts. And so, in deciding *Stone* "v. *South Carolina*, 117 U. S., 430, we took occasion "to say: '*All issues of fact* made upon a petition for "removal must be tried in the Circuit Court, but "the state court is at liberty to determine for itself "whether on the face of the record a removal has been "effected.' It is true, as was remarked by the su- "preme judicial court of Massachusetts, in *Amy* v. *Mann-* "*ing*, 144 Mass., 153, that this was not necessary "to the decision in that case, but it was said on full con- "sideration and with the view of announcing the opinion "of the court on that subject. Only two weeks after "that case was decided, *Carson* v. *Hyatt* came up for "determination, in which the precise question was di- "rectly presented, as the allegation of citizenship in the "petition for removal was contradicted by a statement "in the answer, and it became necessary to determine "what the fact really was. We there affirmed what had "been said in *Stone* v. *South Carolina*, and decided that "it was an error in the state court to proceed further "with the suit after the petition for removal was filed, "because the Circuit Court alone had jurisdiction to try "*the question of fact* which was involved. This rule "was again recognized at this term in *Carson* v. *Dun-* "*ham*, 421 U. S., 121. * * *

"To our mind it is the true rule and calculated to "produce less inconvenience than any other. The theory "on which it rests is that the record closes, so far as the "question of removal is concerned, when the petition "for removal is filed and the necessary security fur- "nished. It presents then to the state court a pure ques- "tion of law, and that is whether, admitting the facts "stated in the petition for removal to be true, it appears "on the face of the record, which includes the petition "and pleadings and proceedings down to that time, that "the petitioner is entitled to a removal of the suit. That "question the state court has the right to decide for it- "self, and if it errs in keeping the case, and the highest "court in the state affirms its decision, this court has "jurisdiction to correct the error, considering for that "purpose only the part of the record which ends with "the petition for removal."

Again, in *Crehore* v. *Ohio, etc., Railway Co.*, 131 U. S., 240 244, Mr. Justice HARLAN, reviewing the authorities, says:

"It thus appears that a case is not in law removable "from the state court upon the ground that it involves a "controversy between citizens of different states, unless "at the time the application for removal is made the "record upon its face shows it to be one that is remov- "able. We say 'upon its face' because 'the state court "is only at liberty to inquire whether on the face of the "record a case has been made which requires it to pro- "ceed no further, and '*all issues of fact* made upon the "petition for removal must be tried in the Circuit "Court.'"

See, also,

Fashnacht v. *Frank*, 23 Wall, 416.

Insurance Co. v. *Pechner*, 95 U. S., 183, 185.

Stone v. *S. Carolina*, 117 U. S., 430.

Williams v. *Association*, 47 Fed. Rep., 533.

Missouri Pac. Ry. v. *Fitzgerald*, 160 U. S, 556.

Besides the case of *Amy* v. *Manning*, 144 Mass., 153, cited in *Burlington Ry. Co.* v. *Dunn*, *supra*, there are numerous decisions of state courts, upholding the jurisdiction of the state courts to pass upon the right of removal where it depends upon a *question of general law* on the face of the bill, petition and bond.

C., C., C. & St. Ry. Co. v. *Monaghan*, 140 Ill., 474, 484.

Darst v. *Bates*, 51 Ill., 440, 448.

Broadway National Bank v. *Adams*, 130 Mass., 431, 433.

Edwards Mfg. Co. v. *Sprague*, 76 Me., 53, 62.

McWhinney v. *Brinker*, 64 Ind., 360.

Springer v. *Sheets*, 115 N. Car., 370.

Goddard v. *Bosson*, 21 Kan., 139 (Opinion by Brewer, J.)

Johnson v. *Brewers' Fire Ins. Co.*, 51 Wis., 570.

State v. *Johnson*, 29 La. Ann., 399.

Dunn v. *Burlington R. R.*, 35 Minn., 73.

Security Co. v. *Pratt.*, 65 Conn., 161.

Mabley v. *Judge Superior Court*, 41 Mich., 31.

Delaware Ry. Co. v. *Davenport Ry. Co.*, 46 Iowa, 406, 409.

Blair v. *West Point Mfg. Co.*, 7 Neb., 146, 153.

Augur v. *E. Tenn. Ry. Co.*, 74 Ga., 634.

It is urged that a party defeated in the state court should not be permitted to have a case docketed in the United States Court and give that court jurisdiction, after the petition for removal has been submitted upon a specific motion of petitioner to a state court, and such court has held that the case was not removable. To do so would make the jurisdiction which this Court has declared to exist in the state courts and which so many state courts of last resort have claimed and exercised, a source of humiliation and confusion to the state tribunals.

Van Fleet on Collateral Attack, Sec. 117, says:

"The state and Federal courts exercising jurisdiction "over the same territory and persons, their officers will "occasionally clash, and it will be a long time before the

"dividing line between them will become so definite and "settled as to be free from doubt. When a debatable "question arises, the court to which it is presented must "hear and decide it; and for the other court to disregard "the decision is simply usurpation. The two sets of "courts complement each other, and together they pos- "sess complete jurisdiction over all judicial matters, and "for any error committed by either in respect to such "jurisdictional questions the Supreme Court of the "United States is the final arbiter."

See, also, Sec. 685, *ibid.*

Dillon on Removal of Causes, 5th Ed., Sec. 45, says:

"And the decision of the state court that the cause of "action is entire, and that no separable controversy ex- "ists, is a decision which it is proper for the Federal "courts to follow."

The right of the Superior Court to proceed in this very case, is established by the decision of the Circuit Court of Appeals of the Seventh Circuit, upon an appeal from an interlocutory order entered by the Circuit Court of the United States after it had denied the motion to remand made in this litigation.

Lake St. L. R. R. Co. v. *Farmers' Loan and Trust Co.*, 77 Fed. Rep., 769; 23 C. C. A., 448.

In considering what the Circuit Court of Appeals says as to the result of the decision of the Superior Court on the petition for removal, it should be borne in mind, that the record before the Circuit Court of Appeals merely showed the denial of the petition for removal, and did not show (because at that time the decree of the state court had not been rendered) that the Superior Court had proceeded to a *final* decree.

The Circuit Court of Appeals answered the contention

made before it, that the state court had no power to retain the case by saying:

"While it is beyond dispute that a state court, when "a petition for removal of a cause is presented, has "*jurisdiction* to decide for itself whether there ought to "be a removal (citing cases), it is equally certain that the "petitionor, notwithstanding an adverse ruling by the "state court, may take a transcript of the proceedings "and papers to the Federal court, whereupon that court "for itself must determine whether a removal has been "affected. (Citing cases.) The cases are not in con- "flict; and, if there should be conflict between the "courts, as there was in this instance, *each court assert- "ing jurisdiction*, it results that *the parties must in* "EACH *court take the steps necessary for the protection or "vindication of their rights.* The proposition that the "decision of the state court refusing the pe- "tition for removal is conclusive upon the "parties in another court proceeds upon the "mistaken assumption that the decision is in its "nature final. It is not final in the court that makes "it" (it has since, however, become final, and is here "sought to be reversed) "and by no rule or principle of "*res adjudicata* can it be final in any other court, what- "ever weight it may be entitled to as authority or upon "considerations of comity."

And the court in stating that it was not necessary to pass upon the dissolution of the injunction which was the subject of the appeal added:

"If, on the other hand, jurisdiction was not acquired" (by the Federal Court, because the case was not removable) "the order of dissolution was a nullity, "without effect in the Superior Court, WHERE THE SUIT "REMAINS, and there is no necessity that it be re- "viewed."

An instance of the application of the correct rule as to the power of the state court to retain jurisdiction, in spite of the attempted removal of a case to a Federal court and the assertion by that court of jurisdiction, is

found in *Drake* v. *Kaiser*, 73 Iowa, 703. In that case the Supreme Court of Iowa sustained the state trial court in its refusal to grant a removal, and in its retention of jurisdiction and rendition of judgment, although the case was docketed in the Federal court, and jurisdiction assumed by the Federal court. The case in the Federal court is shown in the report of *Wagner* v. *Drake*, 31 Fed. Rep., 849.

In *White* v. *Holt*, *Judge*, 20 W. Va., 792 (111 U. S., 134), the facts were as follows:

One White brought an action in the Circuit Court of West Virginia, held by Judge Holt, against the Chesapeake and Ohio Railroad Company. The defendant presented a petition and bond for removal, which was denied by Judge Holt. Thereupon the defendant obtained a transcript of the record and filed the same in the Federal Circuit Court. That court took jurisdiction of the case and ordered it docketed, etc. (20 W. Va., 796.)

Upon this being made known to Judge Holt, he fell into the error indulged in by the Supreme Court of Wisconsin in a certain case, and held that he had no further power to consider the case. Thereupon the plaintiff applied to the Supreme Court of Appeals of West Virginia for a writ of mandamus, directing Judge Holt to proceed with the trial. The Chesapeake and Ohio Railroad Company, the defendant, was made a party to the petition, and, upon the mandamus being awarded, took that case to this Court, where the writ of error to the West Virginia court was dismissed. (*Chesapeake and Ohio Railway* v. *White*, 122 U. S., 625.) The Federal Circuit Court not only took jurisdiction, but finally dismissed the case for want of prosecution.

The Supreme Court of West Virginia discusses the

question so exhaustively that we quote at length (20 W. Va. Rep., at p. 800):

"The first inquiry that should be made is, was the "action of *A. E. White, Adm'r.* v. *The Chesapeake* & "*Ohio Ry. Company removable* under the acts of Con- "gress?"

After reciting the record as to this point, and determining for itself that the case was not in fact removable, the court proceeds:

"We can see no middle grounds; either the state "court has the right to decide judicially, whether "or not the requirements of the acts of Congress relative "to the removal of causes into the Federal court have "been complied with, or else the state court has no rights "whatever in the premises, and the mere filing by the "party in the Federal court of the petition and bond at "any stage of the proceedings in the state court, *ipso* "*facto*, removes the cause into the Federal court, and "upon a motion to remand the latter court alone has "the right to decide whether or not the petition was "filed in time, whether or not the bond and security were "sufficient and whether or not the facts as they appear "by the record entitle the party to have his cause re- "moved. I know a number of courts have so decided, "but among them there is no decision of the Supreme "Court of the United States. (Citing several state and "*nisi prius* Federal decisions.) On the other hand it "has been held by many courts that it is the duty of the "state court, to whom the application for removal is "made, to inquire into the facts and judge and pass upon "the question whether or no, under the act of Congress, "the case is removable, and either to grant or to deny the "prayer of the petition. (Citing twenty-three different state court cases.)

The court then reviews some of these cases and proceeds (page 806 of report):

"We have reviewed these authorities with the purpose "of showing what construction the courts of last resort "of a large number of the states have put upon the re-

"moval acts of Congress, with regard to the right of the "State court to investigate and *judicially* pass upon the "facts necessary to entitle a party to a removal of a "cause, before it is compelled to relinquish its jurisdic- "tion. But in full accord with these state authorities "are decisions of the Supreme Court of the United "States."

The court then proceeds to review *Gordon* v. *Longest*, 16 Pet., 97; *Kanouse* v. *Martin*, 15 How., 198; *Fashnacht* v. *Frank*, 23 Wall., 416; *Kimball* v. *Evans*, 93 U. S., 320; *Railway Company* v. *Ramsey*, 22 Wall., 328; *Bible Society* v. *Grove*, 101 U. S., 611; *Insurance Co.* v. *Pechner*, 95 U. S., 183; *Armory* v. *Armory*, 95 U. S., 196; *The Removal Cases*, 100 U. S., 474, and *Railroad Co* v. *Koontz*, 104 U. S., 5, and proceeds:

"The Circuit Court of Greenbrier not only had the "right to decide the question, whether the action was re- "movable, but as we have found decided it correctly. "The filing of the transcript and the docketing of the case "in the Federal Court after the filing of the petition and "bond, of course, did not and could not remove the "case." (*Merchants National Bank* v. *Brown*, 17 Fed., 161.) "When the State Circuit Court refused the peti- "tion of the defendant, the proper course for it to have "pursued, instead of defying the state court, was to "submit to the refusal of the court, proceed with the "trial, and in case of an adverse judgment take an appeal "to this court, and if the judgment of the court below "had been affirmed, obtain a writ of error from the "Supreme Court of the United States, which alone can "finally decide the question. *There is neither reason nor "authority for the proposition, that an inferior Federal "court can sit in review of the judgment of even an in- "ferior state court.*"

The court then points out the confusion and conflict arising from any other course, and adds:

"It having been many times held by the Supreme "Court of the United States, that before the state court

"is compelled to give up its jurisdiction it must be judi-
"cially informed that its power over the case has been
"taken away, then that judgment like any other ought
"to stand until it is reversed by appellate proceedings,
"and when so reversed all orders entered after a proper
"application for removal has been made, and a case for
"removal is shown to exist, shall be declared null and
"void by such appellate court. *Hadley* v. *Dunlap*, 10
"Oh. St., 1. But it has been uniformly held by the
"Supreme Court of the United States that the jurisdic-
"tion of the state court is in no case taken away unless
"the case at the time of the application was removable;
"and that the state court must pass upon that question.
"In this case the state court did pass upon that question
"and denied the prayer of the petition; and we have
"found that the case was not removable. Therefore,
"the jurisdiction of the state court was not ousted, and
"the docketing of the action in the Federal court could
"not remove a non-removable case.

The court then refers to *Dietzsch* v. *Huidekoper*, 103 U. S., 494, and distinguishes it on the sound ground that the case removed therein was removable.

If this case is not removable, the Federal Circuit Court never had any jurisdiction to order it docketed or to pass on the motion to remand. Its action was *coram non judice*. Plaintiff in error, however, has strenuously contended that by reason of the docketing of the case in the United States Circuit Court, and the refusal of that court to remand, this case in all of its subsequent proceedings through the Superior, Appellate and Supreme Courts, has been only a phantom.

That *White* v. *Holt*, 20 W. Va., 792 (same case in its different phases in this Court, 111 U. S., 134; 122 U. S., 625), *supra*, was correctly decided is evident from the following cases, which sustain its reasoning:

Beadleston v. *Harpending*, 32 Fed. Rep., 644.

Springer v. *Howes*, 69 Fed. Rep., 849.
Connell v. *Utica I. E. R. & R. Co.*, 13 Fed. Rep., 241.
Gregory v. *Hartley*, 113 U. S., 742, 745.
Burlington Ry. Co. v. *Dunn*, 122 U. S., 513.
Crehore v. *Ohio etc. Ry. Co.*, 131 U. S., 240, 244.
Missouri Pac. Ry. Co. v. *Fitzgerald*, 160 U. S., 556.
Broadway Nat. Bank v. *Adams*, 130 Mass. 431.

In the following cases this Court has affirmed the judgments of state courts in cases where there was an unsuccessful attempt at removal of the case to the Federal court. If the attempt at removal deprived the state court of jurisdiction as plaintiff in error has contended, then such cases have been wrongfully decided.

Ins. Co. v. *Pechner*, 95 U. S., 183, 185.
Gregory v. *Hartley*, 113 U. S., 742, 745.
Manning v. *Amy*, 140 U. S., 137.
Oregon Short Line Ry. v. *Skottowe*, 162 U. S., 490.
Merchants' Cotton Press Co v. *N. A Ins. Co.*, 151 U. S., 368.
Tripp v. *Santa Rosa St. R. R. Co.*, 144 U. S., 126.
Fashnacht v. *Frank*, 23 Wall., 416.

In addition to these, *Florence Sewing Machine Co.* v. *Grover & Baker Co.*, 110 Mass., 70, should be noted. In that case removal was denied in the state court, and a transcript filed in the United States Circuit Court, *where*

a motion to remand was denied. (1 Holmes' C. C. Rep., 235, Fed. Case No. 4,883, and note thereto.) The cause proceeded to final judgment in the state court, which was affirmed by this Court. *Sewing Machine Company Cases*, 18 Wall., 553.

Similar judgments in state courts were affirmed in *Vannevar* v. *Bryant*, 21 Wall., 41 (affirming the judgment in *Bryant* v. *Rich*, 106 Mass., 180), and in *Railroad Company* v. *McKinley*, 99 U. S., 147.

In *Young* v. *Parker's Administrator*, 132 U. S., 267, this Court says, in a case where the removal was improperly granted, "that therefore the jurisdiction of the state court was never divested."

In *Merchants' Nat. Bank* v. *Brown*, 17 Fed. Rep., 161, the court says:

"As the jurisdiction of the state court has never been "lawfully divested, it follows that this court has never "acquired jurisdiction. The case has never been removed "from the state court to this court. It cannot, there- "fore, be remanded, but all proceedings in this court should "be dismissed, and such an order will be entered, with "costs."

In *Edwards Mfg. Co.* v. *Sprague*, 76 Me., 53, the Supreme Court of Maine quotes with approval the following from *Stone* v. *Sargent*, 129 Mass., 507:

"It is the duty of the state court, before relinquishing "jurisdiction of a cause once lawfully brought before it, "and discharging that cause from its own docket, to be "satisfied that there has been a compliance with those "conditions. If the highest court in the state errs in "holding that the petitioner is not entitled to remove the "cause, its judgment may be revised and reversed on "writ of error by the Supreme Court of the United "States, and all proceedings had in the courts of the state "after due application for a removal may be ordered by "that court to be set aside. But no act of Congress and

"no adjudication of the Supreme Court of the United "States has made the opinion of the state court upon the "question, whether its own jurisdiction must be sur- "rendered, *subordinate to the opinion of any Federal "tribunal below the Supreme Court.*"

As further showing that the state court has powers at least equal to those of the *nisi prius* Federal courts to pass upon removability as a question of law, the cases are to be noted which consider what the effect is on the judgment of a state court, if it errs in passing upon the removability of a case.

This question is passed upon in *Johnson* v. *Brewers Fire Ins. Co.*, 51 Wis., 570. The Supreme Court of Wisconsin there says:

"This is an appeal from the judgment of the County "Court of Milwaukee County in favor of the plaintiff "and against the defendant. The action in the County "Court was founded upon a judgment recovered in the "Circuit Court for Menominee County, in the State of "Michigan, in favor of one Boswell, against the defend- "ant, which judgment had been assigned to the plaintiff "below before suit was brought. The defendant an- "swered in this action *nul tiel* record. Upon the trial "the plaintiff introduced an exemplified copy of the suit "in the Michigan court, showing the rendition of the "judgment sued upon, and also proved an assignment of "the same to the plaintiff. It appeared by the judg- "ment roll in evidence that a verified petition and "bond for removal of the cause to the United "States Circuit Court were filed in the state "court on the 24th of August, 1874, and a "motion by the defendant for a removal was made, "which was denied on the 11th of September following. "Thereupon the defendant made a motion for the con- "tinuance of the cause, which motion was granted. It "appears that a second petition and bond of removal "to the United States court were filed on the 3rd day of "May, 1875. A motion for a removal was again made, "which was denied on the 5th of that month."

(The statement of the case also shows that *the petition and bond were in fact sufficient*, and that on the denial of removal the defendant, on May 28, 1875, filed a transcript in the United States Circuit Court; that the plaintiff entered his appearance in that court and *moved the court to remand the case, and that such motion was denied.* Report of case, pp. 571, 572.)

"Thereafter the case was called for trial, damages as-
"sessed by a jury in the absence of the defendant, and
"the judgment ($3,015.74) sued upon was rendered.
"These are the material facts upon which the real ques-
"tion of law arises upon this appeal. That question is:
"do these matters set forth in the record of the state
"court of Michigan show that the judgment of that court
"was *not merely voidable for error, but absolutely void?*
"It is apparent that that is the only question
"which is open for our consideration—whether, indeed,
"the Michigan court lost all jurisdiction to proceed
"in the cause, after the application was made, under the
"provisions of the act of Congress for its removal into
"the Circuit Court of the United States. Mere error
"in the proceedings of the state (Michigan) court cannot
"be corrected in this court, or reviewed here, for the
"obvious reason that we have no revisory power over
"that court. But it is claimed by the learned counsel
"for the defendant, that, as soon as application was
"made to the state court, in conformity to the acts of
"Congress, for a removal of the cause *eo instanti* the
"state court lost all jurisdiction over it, and every sub-
"sequent step therein was *coram non judice*, and the
"judgment rendered was null and void. In this case
"counsel insists that the application for the removal
"was sufficient in form and reasonable in time, and
"ousted the jurisdiction of the state court, and that in
"this *collateral* action we should hold that the record
"shows an entire want of jurisdiction to render the
"judgment sued upon. A majority of the court is not
"prepared to adopt this view of the law. In dis-
"senting from it we hold that when the case is
"within the act of Congress and an application in

"proper form for its removal is made, it is "the duty of the state court to accept the petition and "bond and proceed no further in the suit. This is the "mandate of the statute. But if the state court declines "to relinquish its jurisdiction, and proceeds to judgment, "such judgment *is not void but erroneous merely.* Un- "til it is reversed or set aside in a proper manner by an "appellate court, it is valid and must be respected; "certainly in a collateral action upon it.

"The defendant had an ample remedy to correct the "decision of the state court refusing to remove the cause "and proceeding to judgment. * * * We are not "aware that the precise question we are considering has "ever been passed upon by the Supreme Court of the "United States. There are doubtless some dicta and "many expressions to be found in the decisions of the "Federal courts, to the effect that, if the case is re- "movable and the proper application is made therefor, "the jurisdiction of the state court is ousted, and all sub- "sequent proceedings in the cause in that court are "*coram non judice.*

"But it is doubtful if this language, in the connection "in which it is generally used, really means anything "more than that *such subsequent proceedings were er-* "*roneous.*"

The court then proceeds to review the authorities and concludes:

"*We have assumed that the state court erred in not re-* "*moving the cause on the application made. But we* "*hold that its subsequent judgment was not rendered void* "*for that reason.* If the state court erred in its decision "upon that point, this court, in an action upon its judg "ment, has no power to correct that error."

In *S. P. R. R. Co.* v. *Superior Court*, 63 Cal., 607, there was an application for a writ of prohibition to a state court which had denied a petition for removal, and was proceeding to the trial of the case. The Supreme Court of California denied the writ, saying, page 613 of the report:

"But it seems to us quite clear that if we can look into "the petition for removal for the purpose of determining "whether a case within Federal cognizance is presented, "the Superior Court in which the case is pending may do "so, and if it can, its determination of the question whether "right or wrong, *would neither be without nor in excess* "*of its jurisdiction.*"

In *Chesapeake and Ohio R. R. Co.* v. *White*, 111 U. S., 134, 137, there was an application for a writ of prohibition to prevent Judge Holt from proceeding in accordance with the opinion in *White* v. *Holt*, 20 W. Va., 792, quoted *supra*. This Court says:

"If a sufficient case for removal was made in the "Circuit Court the rightful jurisdiction of that court is "gone, and it cannot properly proceed further; but if it "does proceed and does force the defendant, who applied "for the removal, to a trial, *the remedy is by writ of* "*error after final judgment*, and not by prohibition or "punishment for contempt."

It would seem therefore, that the judgment of a state court which has wrongfully denied a petition for removal is merely erroneous and not void and not open to attack collaterally. The decision of Judge Grosscup refusing to remand was *collateral* and not upon review.

In the Federal courts such a state court judgment is entitled to at least the same force and effect as it would be given in another state.

Pennoyer v. *Neff*, 95 U. S., 714.
Kansas City, Ft. S. & M. R. Co. v. *Morgan*, 76 Fed. Rep., 429.

It has already been shown that there has been no distinction made in this Court in favor of the decision of the Federal Circuit Courts upon the question of the removability of a case. If any distinction is to be made it should be made in favor of the state courts, whose juris-

diction is general, rather than in favor of the Federal courts, whose jurisdiction is limited. The removability of a case is a question arising incidentally in the state courts. In the Federal courts it is a condition precedent to any jurisdiction whatever.

This Court has recently held that where a Federal court errs in its decision as to the removability of a case, its judgment is *merely erroneous and is not void.*

In *Dowell* v. *Applegate*, 152 U. S., 327, a case arose in the state courts in Oregon. The issues involved questions determined in a former action begun in a State Circuit Court and removed into a Federal Circuit Court upon grounds alleged to have been insufficient. The state court in the second case ignored the prior adjudication in the Federal Circuit Court on the ground that the removal was improper and that the Federal Circuit Court was without jurisdiction. This Court says, page 337 of the report:

"If the Federal court erred in assuming or retaining "jurisdiction of Dowell's suit—a question not necessary "to be examined—would it follow that its final decree "being unmodified and unreversed, can be treated as a "nullity *when assailed collaterally* by one who was a "party to the suit in which it was rendered?"

This Court then reviews numerous cases, and proceeds:

"These cases establish the doctrine that, although the "presumption in every stage of a cause in a Circuit "Court of the United States is that the court is without "jurisdiction unless the contrary affirmatively appears "from the record (*Bors* v. *Preston*, 111 U. S., 252, and "the authorities there cited); yet if such jurisdiction "does not so appear, *the judgment or final decree cannot "for that reason be collaterally attacked or treated as a "nullity.*

"These authorities above cited, it is said, do not meet "the present case, because the ground on which it is

"claimed the Federal court assumed jurisdiction was in-
"sufficient in law to make this case one arising under the
"laws of the United States. But that was a question
"which the Circuit Court of the United States was com-
"petent to determine in the first instance. Its deter-
"mination of it was the exercise of jurisdiction.
"Even if that court erred in entertaining jurisdiction,
"its determination of that matter was conclu-
"sive upon the parties before it, and could not
"be questioned by them, or either of them, *col-*
"*laterally or otherwise than on a writ of error or appeal*
"*to this court.* As said in *Des Moines Nav. Co.* v. *Iowa*
"*Homestead Co.*, above cited, if the Circuit Court 'kept
"the case when it ought to have been remanded, or if it
"proceeded to adjudicate upon matters in dispute between
"two citizens of Iowa, when it ought to have confined
"itself to those between the citizens of Iowa and the citi-
"zens of New York, its final decree in the suit could
"have been reversed, on appeal as *erroneous*, but the
"decree would *not have been a nullity.* To determine
"whether the suit was removable in whole or in part or
"not was certainly within the power of the Circuit Court.
"The decision of that question was the exercise and the
"rightful exercise of jurisdiction, no matter whether in
"favor of or against taking the cause.' "

The right of one party to remain in the state courts is as great as the right of the other to take the case into the Federal courts. It is certainly as serious a fault for the Federal courts to take a case from the state courts which is not removable, as for the state courts to retain a case which is removable. There is no possible ground of distinction upon which it can be held, that a judgment of a state court, where it has erred upon the question of removal, *is void*, while the judgment of a Federal court under like circumstances *is only erroneous*, nor is there any reason for holding that the decision of a Federal court refusing to remand is of any more force than the decision of a state court refusing to grant a removal.

This defendant in error submits that there is no ground discoverable upon which it can be reasonably asserted that this case was removable. Such being the status of the litigation, any further delay will tend to seriously embarrass the trust estate, and the duty of this defendant in error to its trust therefore leads it to join in the motion to dismiss the writ of error, or for an affirmance. Since the Supreme Court of the state has by its construction of a state statute conclusively established the fact of the incompetency of plaintiff in error as trustee, this defendant is in the embarrassing position of a trustee, which is required by the trust instrument to appoint a new trustee but which finds a cloud thrown upon the exercise of such power of appointment by reason of the *supersedeas* issued by this Court, which stays the finality of the decree directing this defendant in error to exercise such power.

It is respectfully prayed that the motion to dismiss the writ of error be granted, or that the judgment of the Supreme Court of Illinois be affirmed.

T. A. Moran,
Levy Mayer,
Solicitors for the American Trust and Savings Bank, Defendant in Error.